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TENANTS IN COMMON—EJECTMENT.

What are the rights of tenants in common in respect to each other? May one tenant in common occupy a several portion of the lands held in common? If so, under what condition? In what cases may one tenant in common maintain ejectment against his co-tenants? What judgment can properly be rendered in such action, when the same is determined in favor of the plaintiff therein?—And by what process of the court, if any, may such judgment be enforced?

We are induced to call the attention of the profession to the consideration of this subject, in consequence of the decision of the Supreme Court of this State in the case of *Carpentier* v. *Webster* (27 Cal. Rep. 524).

The important portions of the head notes of the reporter, which appear to be a fair condensation of the substance of the decision, are as follows:

> "If one tenant in common encloses and enters into the exclu-
> "sive possession of a portion of the common lands, not exceed-
> "ing in quantity the number of acres which he would be entitled
> "to have allotted to him on partition of the whole, and refuses

Entered according to Act of Congress, in the year 1867, *by* F. CLARKE, *In the Clerk's Office of the United States District Court for the Northern District of California.*

"to allow a co-tenant to occupy this portion with him, it is an "ouster of the co-tenant and he may maintain ejectment and be "let into the possession of the part from which he is thus "excluded.

"If one tenant in common is in the exclusive possession of a "portion less than the whole of the common lands, and his co-"tenant demands of him to be let into possession of the same "on the ground of his joint ownership, and the other, while "admitting the several title of the co-tenant, refuses to let him "into possession, this refusal is an ouster.

"If a tenant in common denies the several title of a co-ten-"ant, but lets him into possession, it is not an ouster; but if "he admits the several title of a co-tenant, and refuses to let "him into possession, it is an ouster."

The facts on which the decision is based, so far as concerns the points under consideration, are few and simple. The plaintiff and defendant were part owners, as tenants in common, of a large ranch or tract of land, consisting of more than two square leagues; the plaintiff, to the extent of one-half, and the defendant, of one-eightieth part; the interest of the latter being equivalent to about one hundred and ten acres. The defendant was, at the commencement of the suit, in the *actual exclusive* possession of about sixty acres, which he had enclosed with a fence, which he was using for agricultural purposes, and on which he had erected a dwelling house in which he was living with his family. It did not appear that the plaintiff was in the actual exclusive possession of any portion of the Ranch in severalty; nor did it appear that any portion of the Ranch, other than the sixty acres in the possession of the defendant, was used, occupied, fenced, or in any manner improved by any person whatsoever. Nor did it appear that the unoccupied portion of the ranch was less fertile, or less valuable to the acre, than the small tract occupied by the defendant.

On the 20th day of December, 1862, the plaintiff served on the defendant a note in the following words:

"GREEN WEBSTER: Sir—You will please take notice that "the lands and premises now occupied by you are parcel of the "Rancho San Ramon, of which I am the principal owner, and "*I demand to be let into the immediate possession and enjoyment* "*of the same, and of every part and parcel thereof.*

Respectfully, yours,

H. W. CARPENTIER."

At the time of the service of the above written notice, the plaintiff "made a verbal demand of the defendant to *be let into possession of the land with the defendant,*"—that is, into possession of the segregated portion occupied by the defendant. In addition to the foregoing facts the following testimony was given on the trial on behalf of the plaintiff by one of his witnesses:

"*Question.* Did the defendant accede to said demand by the "plaintiff? (Referring to the demand *to be let into possession* "above mentioned).

"*Answer.* The defendant did not accede to said demand.— "*He said he owned an interest in the ranch, and was in posses-* "*sion of no more than he was entitled to*, and that he could not let "the plaintiff into the possession, unless at the end of a lawsuit, "or words to that effect.

"*Question.* When the defendant said that *he was an owner* "*of an interest in the rancho*, what, if anything, did the plain- "tiff reply?

"*Answer.* I think he said*: I suppose you are, but that does* "*not entitle you to keep me out of the possession, also;* or words "to that effect. The defendant positively refused *to let the* "*plaintiff into the possession.* I do not recollect the exact words, "but I knew he was very positive.

"*Cross Examination.* This conversation took place within "the inclosure of the defendant near his house.

"*Question.* Was the verbal demand substantially the same "as the within one?

"*Answer.* It was substantially the same. *The plaintiff de-* "*manded to be let into possession of the lands occupied by the*

" *defendant, and the defendant refused.* The defendant's house " is situated about the middle of the rancho. There is embrac- " ed within the limits of the *diseño* (map or plan of the ranch) " referred to in the decree of confirmation, about six leagues of " land, and *the land occupied by the defendant* is about one four- " hundreth part of the six leagues, and about *one hundred and* " *thirtieth part of two leagues.*" (See for above facts pp. 542, 543).

It thus appears that the defendant, so far as quantity is concerned, was in possession of less than the equivalent of one-half of his actual interest in the land; that nearly the whole of the ranch was unoccupied, and that the plaintiff might have taken possession of a quantity much larger than his interest, if he had chosen. The suit was brought, not for the entire ranch, but only for that particular portion occupied by the defendant. The complaint included only this latter portion; and the evidence above quoted applies to this portion alone. The demand of the plaintiff was, therefore, to *be let into the immediate possession and enjoyment of every part and parcel* of that portion of the common lands, which was in the *actual occupation and possession of the defendant*, which was used and cultivated by him, and on which he and his family resided. The court say, in their opinion, (pp. 543–4), that when the defendant first entered upon the land, he found it in a wild state, and that he had added very much to its value by cultivation and by erecting buildings thereon.

Upon the foregoing facts, the District Court of the Fourth Judicial District, instructed the jury to find a verdict for the defendant, and afterwards rendered judgment in his favor.

On appeal, this judgment was reversed by the Supreme Court, on the ground that it was the duty

of the defendant, when thus demanded, *to have let the plaintiff into possession of the premises thus occupied by the defendant, and every part and parcel thereof, jointly with him.*

The judgment is not put on the ground of the disparity in the quantity of interest respectively owned by the plaintiff and defendant. Had the plaintiff owned only the undivided one-thousandth part, instead of the undivided one-half, the judgment must, according to the reasoning of the court, have been the same; and we do not see that there is any difference in principle, whether the plaintiff owned one half, or any smaller or larger portion.

The action, it will be recollected, was not a suit in partition, nor a suit to recover the plaintiff's share of the rent and profits, but an action of ejectment purely and simply.

The theory of the plaintiff's case, as well as of the judgment of the court, proceeds upon the assumption that, if one tenant in common be in the actual possession of a definite portion of the common lands, any co-tenant may demand *to be let or put into the joint possession with him*; and, upon a refusal, may maintain an action of ejectment against his co-tenant so in possession; and it must follow as a corrollary from this doctrine that the plaintiff may be put by the sheriff actually and bodily into possession jointly with the defendant of the same definite portion of the common lands.

There are tracts of land in this State as well as elsewhere, of which there are fifty, an hundred, or more, owners as tenants in common. If one co-tenant may maintain such an action, then any other

co-tenant may. If any one co-tenant must *be let into joint possession*, then each one of the hundred or more co-tenants must, also, upon application, and on the same principle, *be let into joint possession.* Thus, there might be, if such a thing were possible, one hundred different persons in the *actual possession*—the positive *pedis possessione*—not only of the same identical piece of land, but of every part, parcel, and particle thereof—all claiming under separate derivations of title--all having diverse views and interests as to the use to be made of the premises —and each being equally entitled with every other, to occupy the same spot, at the same time. It is generally understood, that two distinct bodies cannot, at the same time, occupy the same space. According to this doctrine, not only two, but any indefinite number, may.

Although the above conclusion would seem to be the unavoidable inference from the reasoning of the opinion ; yet, it may be, that the court did not intend to carry the doctrine announced to that extent. Perhaps, we have misapprehended the decision. It may possibly be supposed that the court intended to hold, that the plaintiff was entitled, on the facts stated, to turn the defendant out of possession, and to be put into possession himself. If such were the views of the court, the result is equally unfortunate. Suppose the plaintiff to have been put into sole possession of the premises, to the exclusion of the defendant, any other one of the co-tenants, might, by similar proceedings, turn the plaintiff out, and recover for himself. Nay, what hinders the defendant, as soon as he has been de-

prived of the possession, from instituting a similar action against his adversary, with the like result? Each of the hundred co-tenants, if there be so many, may pursue the same course—each turning out his predecessor, and being let in himself. And when they have all enjoyed the benefit of this proceeding, they may repeat the same in an inverse order.

It is with difficulty that we can admit the idea that the court intended to lay down, for the guidance of the profession and the tenure of property in this State, doctrines of law so impracticable. Perhaps they intended no more than to enunciate the old doctrine, that where one tenant in common in the actual possession, either of the whole, or of a part, of the lands held in common, ousts his co-tenant by denying his title, or otherwise, the latter may maintain an action of ejectment. But here, again, the decision of the court runs foul of another obstacle. It was not shown by the plaintiff that the defendant had denied, or questioned, or even doubted, the title or right of the plaintiff. On the contrary, *the defendant expressly admitted that the plaintiff was a tenant in common with him.* There was no pretence that the defendant had *actually ousted* the plaintiff, or had *denied his interest in common;* unless the denial of the plaintiff's demand "to be let into the possession" of the parcel of land actually occupied by the defendant, be in law, as seems to have been held by the court, a *sufficient ouster* or *denial of ownership* to enable the plaintiff not only to maintain the action, but also to be put into actual possession jointly with the defendant.

What is the theory of an aetion of ejeetment by one tenant in eommon against another? And what end is attained by sueh aetion?

It is recognized by law, as well as eommon in praetice, that one of several tenants in eommon may have the aetual separate possession of a part, and even of the whole, of the lands held in common. In the nature of things, this must be the ease, or the land must remain unoeeupied. The law, however, holds sueh possession to be, not simply the possession of the aetual oeeupant, but the joint possession of all the persons who are *admitted* to be owners in eommon. In other words, the possession of one tenant in eommon, *is the possession of all the tenants in common.* This community of possession may be severed in three ways;—1st, by the private agreement of the various owners;—2d, by an aetion of partition; the judgment in whieh gives to eaeh owner his interest in severalty, whieh he had before held in eommon;—and 3d, by an *ouster*, by the tenant in actual possession, of his eo-tenant; whieh can only be by the *denial*, or by *some act equivalent to a denial*, of the co-tenaney. When such *ouster* oeeurs, the *common chain of possession* between the co-tenants is broken; and it must be united again, before the parties ean be put in that *legal relation* towards eaeh other which is essential in order to warrant a suit of partition. And it is the objeet of the aetion of ejeetment to restore this *legal relation*—this *broken chain of possession*—and thus plaee the parties in sueh a eondition in respeet to eaeh other, that the one may apply for a partition of the lands. However it may be under our statute

of partition, it is clear that, neither at common law, nor in chancery, could a suit of partition be maintained between parties, any one of whom denied his relation of tenant in common with the others. No action of partition lay at common law—and if, in a suit in equity, either of the defendants, by his plea, denied the tenancy in common, the proceedings were stayed *in limine*, until this question should be determined by an action of ejectment. (*Clapp* v. *Bromagham*, 9 *Cow.* 530, 563, *et seq.*).

But the ejectment, in such case, in no wise, affected the actual possession of the occupant in severalty. If decided in favor of the plaintiff, the judgment was, in effect, simply a determination that the defendant's possession was not his *own possession merely*, but the *joint* possession of himself and the plaintiff. The plaintiff was then in a position to compel a partition of the land by his suit in chancery.

The *ouster* by one tenant in common of another, operates as a *disseisin* of the latter. Thereby his possession is interrupted—its legal unity is broken. The possession of the actual occupant, before such *disseisin*, was the possession of his co-tenant, as well as his own; whereas, after the *disseisin*, the possession is, in law, his individual possession. Hence, the statute of limitations never begins to run in favor of one tenant in common in actual possession, against another out of possession, until after such *ouster* or *disseisin*. And if the period limited by the statute has run since such *disseisin*, the right of the tenant, whose possession has been severed by the *disseisin*, is forever barred. (*Clapp* v. *Bromagham*, *supra*).

As the possession of one tenant in common, continues to be the possession of his co-tenants, until the unity thereof is destroyed by some act of the actual occupant, there is, therefore, no necessity of an action of ejectment to give *him* the possession, who, in contemplation of law, already has it. In *Doe* v. *Prosser* (*Cowper*, 129), Lord Mansfield says, that the possession of one tenant in common, *eo nomine, as tenant in common*, can never bar his companion, *because his possession is not adverse* to the right, *but in support of the title;* but that, if the party in possession *denies the title* of his companion, *claiming the whole*, will not pay his companion his share, and continue in possession, *such possession is adverse* and *ouster* enough, and that actual hindrance is not necessary.

One of the conditions of maintaining an action of ejectment by one tenant in common against another, in the opinion of Lord Mansfield, is, that the one in actual possession should *deny the title* or *right* of the other. Mere continuance in sole possession—no matter for how long a time—is insufficient.

There must be some claim of *exclusive right* of possession, or *denial* of the co-tenant's *right*, or some act equivalent thereto, in order to constitute an ouster. (Clapp *v.* Bromagham, 9 Cow. 530 ; Brackett *v.* Norcross, 1 Greenleaf, 82 ; Jackson *v.* Tibbitts, 9 Cow. 241 ; Sigler *v.* Van Riper, 10 Wend. 415).

B.

(TO BE CONTINUED.)

Upon Titles to Mining Claims, and Granting the Right of Way over Public Lands to Ditch Companies.

Chapter CCLXII.—An Act granting the right of way to Ditch and Canal Owners, over the Public Lands, and for other purposes, July 26th, 1866.

UNITED STATES STATUTES AT LARGE, FIRST SESSION OF THE 39TH CONGRESS, pp. 251–3.

BY GREGORY YALE.

PART I.

"IN every department of human affairs," says Stewart Mills, in presenting his Political Economy to the public, "Practice long precedes Science; systematic inquiry into the modes of action of the power of nature, is the tardy product of a long course of efforts to use those powers for practical ends."

The "tardy product" of our government in conferring permanent titles to holders of mining claims upon public lands in California, is to be found in this law. As the initial act of the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the State and nation than for the perfection of its provisions; or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections, or the introduction of objectionable principles in the mode to be followed in acquiring a title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now

anticipated. An explanation is due to the authors of the law in order to account for the anomalous title to an act providing for the issuance of a patent to a quartz lode, by declaring it to be an act granting the right of way over the public lands to the owners of ditches and canals. The bill introduced by Mr. Conness, on the same subject as we understand, had passed the Senate, and was under consideration before the House committee on public lands, to whom it had been referred in the due course of legislation, and that committee, through its chairman, Mr. Julian, a member from Indiana, refused to report it back for the consideration of the house. In the meantime, Mr. Stewart, from Nevada, had introduced a bill relating to the right of way over the public lands to water companies, which had been favorably considered by the senate committee, of which he was a member; but instead of reporting favorably upon the bill, he reported this act as a substitute, striking out all after the enacting clause, thus incorporating the substance of the two bills.— The substitute passed each house as we find it in the statutes, without amendment, and under the omnibus branch of the title, "for other purposes," so convenient to legislators, but which would have puzzled Coke, in his comments upon the title of a statute, we have an act providing for definitive titles to a class of mining claims under the title of a law to construct canals.

It must not be supposed that this law attempts, or aims at, devising a system of mining upon the public land. It may have been wise to have done so, by adopting some general provisions applicable

to all parts of our new territory, where mining is rapidly monopolizing private industry—provisions, at least, which look towards a compulsory and proper system of working, under the penalty of forfeiture, in case of abandonment or ruinous working; for mining property, as the representative of a branch of industrial art, differs, as such, in its relation to public welfare, from other species of private property, in many respects, which make it the peculiar subject of governmental care and protection. Considerations of public policy may yet demonstrate the evil of granting an absolute title by the United States, absolved from all conditions, by placing the subject matter of the title beyond the reach of State regulation, leaving us as a nation without the sanction of some wholesome mining system or code, which has always signalized nations rich in the precious and the useful metals. The celebrated Fourcroy, in presenting the Mining Code of France to the Council of State, over which Napoleon presided, under the Empire, on the 1st of February, 1810, and which was adopted on the 21st of April, as a revision of the Mining Code of 1791, stated the fundamental principle of the law to be this: "The system rests upon this principle, *which is uniform with almost every people*, that mines are public property, constituting a part of the national domain, and that they belong to the State which causes them to be worked for its own account, or which grants them to individuals, to be worked by them under certain conditions." *De Fooz*, 36.

Before analyzing this statute, it may be well, as matter of history, to recall a few prominent facts

connected with the action of the federal government, executive and legislative, from the discovery of gold by Marshall, at Coloma, in January, 1848, up to the passage of the act; and also to show what has been done by the State legislation, our Supreme Court, and by the miners themselves, in the absence of congressional legislation, towards securing titles to mining claims. This review is necessary to the subject, and will hereafter be found convenient for reference, and valuable in tracing the extraordinary history of our mining policy.

Ratifications of the treaty with Mexico were exchanged at Queretaro, on the 30th of May, 1848, and on the 6th of July of that year President Polk communicated the treaty to Congress, then in session, by a special message. In speaking of the territories acquired by the treaty from Mexico, he says, "they constitute of themselves a country large enough for a great empire, and their acquisition is second only in importance to that of Louisiana in 1803. Rich in *mineral* and agricultural resources, with a climate of great salubrity, they embrace the most important ports on the whole Pacific coast of the continent of North America." In his annual message of the 5th of December, 1848, after the remarkable saying, that "the Mississippi, so lately the frontier of our country is now only its centre," he formally communicates to Congress the great gold discovery in a part of the newly acquired dominion.

"It was known that mines of the precious metals existed to a considerable extent in California at the time of its acquisition.* Recent discoveries

* This statement is not strictly true, if we follow that of the Supreme Court, in *Flower* v. *Fremont*, 17 Cal., where it is said that at the date of the cession

render it probable that these mines are more extensive and valuable than was anticipated. The accounts of the abundance of gold in that territory are of such an extraordinary character as would scarcely command belief, were they not corroborated by the authentic reports of officers in the public service who have visited the mineral district, and derive the facts which they detail from personal observation. * * * It appears, also, from these reports that mines of quicksilver are found in the vicinity of the gold region. One of them is now being worked, and it is believed to be among the most productive in the world." He then recommends the establishment of a branch mint in California, and the organization of a territorial government.

The organization of a territorial government for Oregon was under discussion during the session, and bills were introduced as substitutes for the organization of the territories of California, Oregon and New Mexico, first by Mr. Clayton, of Delaware, and then by Mr. Benton ; but that of Oregon alone was organized. At this session Mr. Douglas introduced a bill for the admission of California, as a State, containing a provision also for the admission of the State of New Mexico.

The first section relating to California provided for "the unconditional reservation to the United States of all right of property in the public domain, and other property ceded to the United States by

no gold or silver had been discovered in the grants under consideration, and hence no proceedings could have been taken by individuals to acquire any interest in the minerals from the Mexican Government. But then one nation with a knowledge of hidden wealth in a country the subject of conquest, would, at least, stand as fair before the world as a vendee who purchases a tract of land containing a mine known to him and not to the vendor, and who is protected in equity.

the treaty of peace concluded with the Republic of Mexico, Febuary 2d, 1848, free from taxes, or assessments of any kind by said State, and also of the power of disposing of the same, including the right of adjusting all claims and titles to land derived from foreign governments, in such manner as Congress shall prescribe."

In none of the proposed legislation was any reference made to the mines. Congress did nothing but extend the collection district of Louisiana to California, virtually; having in 1848, established post offices in San Diego, Monterey and San Francisco, and the mail line from Panama to Astoria, without reference to the gold mines of California.

In the meantime California, mines and all, became the ward of the military governors appointed from time to time by the war department, with an occasional messenger from the departments of state and the interior, to look into the condition of affairs and report, especially on the *titles* to lands and mines. General Kearney, in March, 1847, and Col. Mason, in January, 1848, settled the titles to the missions, temporarily. Gen. Kearney proclaimed to the people that the "poisoned fountains," which the civil wars were declared to have been, were then, "dried up;" and, some months afterwards, Col. Mason also proclaimed to the people, after telling them that "the labor of the agriculturalist, guided by the lamp of learning, will stimulate the earth to the most bountiful production," without holding out any inducements, that gold would be discovered through the same medium, or any other, that "the choked up

channels of trade will be opened, and the poisoned fountains of domestic faction *forever* dried up."

On the 12th day of February, 1848, ten days after the Treaty with Mexico was signed by the commissioners of each nation, but then unknown to the military officers in California, and shortly after the discovery of gold, Col. Mason as Governor issued a remarkable proclamation concerning the mines, operating directly, as he supposed, upon mining *titles;* and, by a marvelous foresight, while committing a blunder in fact, settled the law as the Supreme Court held fourteen years afterwards, in Castellero's case.

"From and after this date, the Mexican laws and customs now prevailing in California, relative to the denouncement of mines, *are hereby abolished.*"

"The legality of the denouncements which have taken place, and the possession obtained under them since the occupation of the country by the United States forces, are questions which will be disposed of by the American government after a definite treaty of peace shall have been established between the two republics."

At that time but few denouncements had been made in California. We hear of the proceedings to denounce the New Almaden, and of the Santa Clara mine, each in the same county. The term is probably used in the proclamation as equivalent to registration, or the means of acquiring a title to mines under the *Ordinanzas de Mineria,* and not technically the denouncement of an abandoned mine, when the title is again taken from the government into which it vests by forfeiture, after the

proprietor ceases to work. We have nothing to do here with the political authority of the officers in abolishing the Mexican law. As the law was afterwards expounded by the Supreme Court of the United States, the act was unnecessary as a precautionary measure on the part of Col. Mason. The leading feature in the *Ordinanzes de Mineria* is the establishment of a mining tribunal before which a registry of the mines can be adjudicated, and by which alone the title can become vested in a private person. This tribunal was the Mining Deputation, and when that was not established the proceedings could be had before the court of the First Instance ; but neither of these tribunals existed in California at the time of the conquest, and an Alcalde had no jurisdiction over the subject matter. The proceedings before him were, therefore, nugatory. *U. S.* v. *Castellero*, 2 Black. General Halleck, who probably framed the proclamation, is of the opinion that when the general ownership of the ungranted mines passed to the United States, the right to acquire private property in them by registry ceased for the want of any expressed will of the new sovereign continuing it. *Introductory Remarks* to the translation of De Fooz, on the Law of Mines, CXLII.

General Riley, as *civil* Governor, in his military capacity, dropping the figurative language of his predecessor, as early as the 2d of June, 1849, in a communication through his Secretary of State, Captain Halleck, who so greatly distinguished himself in that capacity till the organization of the State government, to Alcalda Majors, of Santa Cruz,

clearly presented the legal *status* of the people, by stating what were the laws in force by which the people were to be governed, "till changed by competent authority," as well as the civil officers who were charged with the administration of the local governments of the towns, and their respective duties. On the next day, the Governor issued his celebrated proclamation, reciting, that as Congress had failed at its last session "to provide a new government for this country to replace that which existed on the annexation of California to the United States," he would call the attention of the people "to the means which he deems best calculated to avoid the embarrassments of our present position." This, he thought, might "be best accomplished by putting in full vigor the administration of the laws as they now exist, and completing the organization of the civil government by the election and appointment of all officers recognized by law; while at the same time a convention, in which all parts of the Territory are represented, shall meet and frame a State Constitution, or a Territorial Organization, to be submitted to the people for their ratification, and then proposed to Congress for its approval."

We know what followed this politic measure.—Local officers were elected in their respective districts; delegates to the convention were selected, the convention holden, a constitution framed, and a repulse by Congress, till the 9th of September, 1850. The mines, all this time, remaining undisturbed except through the activity of the sturdy miners, who flocked to the diggings from all parts of the

world, and were content, as of necessity they had to be, with the *laisser-faire* principle—the provisional legislature of 1850, doing nothing in the way of regulating the working of the mines, beyond the charge of twenty dollars a month to foreigners for the privilege of digging on the public land. On the next day after the date of this proclamation, Riley dispersed, by a ukase *militaire*, "the Legislative Assembly of the District of San Francisco," which had assembled in April, 1849, and "usurped powers which are vested only in the Congress of the United States," for the want of any other Congress to legislate for the country, and which was rapidly approaching the formation of a system of mining laws, commencing with the principle always inherent in assemblies possessing the slightest taint of legislative functions—the one inseparable right of taxation. (TO BE CONTINUED.)

IN THE MATTER OF THOMAS DONAHUE:

Application to Judge S. H. Dwinelle, of the Fifteenth District Court, for Discharge on Habeus Corpus.

POINTS IN THE BRIEF OF COL. GEO. F. JAMES,
Counsel for Plaintiff.

Facts.

The petitioner was arrested as a fugitive from justice, from Washington Territory, on a warrant issued by the Police Judge of the city of San Francisco upon the affidavit of one W. J. Terry, charging him with the commission of the crime of murder in said Washington Territory. Afterwards an examination was had before said Police Judge, whereupon the prosecution examined orally several wit-

nesses, and closed without the production of any written evidence tending to show that he was charged with the commission of any offence.

The petitioner was held in custody by said Police Judge to await a requisition of the Governor of Washington Territory, whereupon he brought his writ of habeas corpus, before the Hon. S. H. Dwinelle, praying to be discharged from custody; "on the ground that he is held without legal warrant or authority."

Points.

1st. "That the Police Judge, before whom the petitioner was examined, and who issued his warrant of commitment, from the operation of which the petitioner seeks to be released, had before him no *legal evidence* of the existence of the alleged fact, recited in his record and warrant of commitment."

2d. That the matter of the return of fugitives from justice, from one State to another, is exclusively within the power and control of the Federal Government.—*Sec.* 2d, Art. 4th, *Constitution of U. S.*

3d. That Congress having legislated, under the above cited section of the Constitution, to carry into effect said provision, such legislation is conclusive and final. That the State of California has no right to legislate, either in contravention of such statute, or in aid thereof, nor to provide for the arrest, or detention of such fugitive.—See sections 1 and 2, Act of Congress of Feb. 12th, 1793. BRIGHT, Dig., p. 293, Ed., 1858: also, COMMONWEALTH v. DEACON, 10 Seg. & Rawle, p. 135. IN THE MATTER OF CLARK, 9 Wend. R., p. 212. IN THE MATTER OF HAYWARD,

1st, Sand. S. C. R., p. 701. JOHNSON v. REILY, 13th Georgia R., p. 97. DEGANT v. MICHAEL, (S. C. Ind., R.,) PRIGG v. COM., OF PENN., 14, Peters, U. S. C. R., p. 539. JACK, A NEGRO MAN v. MARY MARTIN, 12th Wend., p. 317. PEOPLE v. S. & J. WRIGHT, 2 Caines cases, p. 212, Ed. 1854. HURD ON HABEAS CORPUS, p. 629. IN THE MATTER OF ROMAINE 23, Cal. R., p. 535. 1st, CLINTON'S N. Y. Law & Equity Dig., p. 594, Ed. 1852. PEOPLE v. JOSEPH SMITH, 3d McLane.

Per Contra.

When it is not the *sole* purpose of the act of the State Legislature to impede, contravene, or aid the act of Congress.—DOWS CASE, 6th HARRIS, Penn. R., p. 37. THE STATE v. BUZINE, 4th Harrington, R., p. 572. FETTERS CASE, 3d Zab. R., N. J. COMMONWEALTH v. WILLSON, Philadelphia R. 80.—COMMONWEALTH v. TRACY, 5 Met., Mass. R., p. 536.

4th. The weight of authority cited, shows that the power of Congress to regulate the whole subject matter of the re-capture of fugitives from justice between the States, is vested exclusively in Congress. And that such persons can only be arrested and held in custody, under and by virtue of the provisions of the act of Congress before cited.

5th. That the evidence, under which the petitioner is held in this case, is not such as is provided for by said act of Congress, in this :—

First.—That no demand for the return of said petitioner, as a fugitive from justice, from Washington Territory, has been made by the Governor of said Territory.

Second.—That no duly certified copy of an indict-

ment found, or affidavit made in said Washington Territory, charging petitioner with the commission of an offence in said Territory, was produced before the Police Judge, who issued the warrant under which he is now held.

6th. The statute of California, if sustained, must be construed so as to harmonize with the act of Congress: to this end in sec. 667, wherein it is provided that "the proceedings, for the arrest and commitment of the person charged, shall be in all respects similar to those provided in this act, for the arrest and commitment of a person charged with a public offence, committed within this State; except that an exemplified copy of an indictment found, or other judicial proceeding had, against him in the State or Territory in which he is charged to have committed the offence, *may* be received as evidence before a magistrate;" the word "may," should be construed to mean *must*:—See SEDGWICK ON STATUTORY AND CONSTITUTIONAL LAW, p. 438, NEWBURGH TURNPIKE CO. V. MILLER JOHNS, Ch. R., p. 112, and BISHOP ON CRIMINAL LAW.

GEO. F. JAMES,
Counsel for Petitioner.

OPINION OF JUDGE DWINELLE.

On the 20th day of September, 1866, W. J. Terry made complaint, under oath, before the Police Judge of the City and County of San Francisco, that on the 14th day of February, 1866, in Walla Walla, Washington Territory, the crime of murder was committed by the petitioner, Thomas Donahue, in feloniously, wilfully and of malice aforethought, shooting with a pistol, one J. F. Patterson; that afterwards, in the

month of April, 1866, the petitioner was lawfully indicted for the said murder in the District Court of the United States, of the Third Judicial District of Washington Territory, and on said indictment duly and legally committed to the custody of the Sheriff of said County of Walla Walla, to await trial. That the petitioner, on or about the 15th day of June last, unlawfully broke jail and escaped from the custody of said Sheriff, and did flee from justice, and is now a fugitive from justice from said Territory, and is now in the City and County of San Francisco, all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California. The Police Judge, on the day the complaint was made, issued a warrant for the apprehension and arrest of the petitioner, and he was arrested and brought before the Police Court on the 22d ultimo, when four witnesses were examined; and the proceedings adjourned from time to time, until the 3d instant, when the Police Judge decided that the petitioner was a fugitive from justice as charged, and ordered that he be committed to the custody of the Sheriff of the City and County of San Francisco for the period of forty days, to await the requisition of the Executive authority of said Territory. In pursuance of said order, the petitioner, by a commitment in due form, was committed to the custody of the Sheriff. The petitioner having applied for a writ of *habeas corpus*, alleging that he was unlawfully deprived and restrained of his liberty by the Sheriff of this City and County, was brought before this Court under a writ issued on his said application. The Sheriff makes return to the writ that he retains the petitioner under said commitment. The petitioner controverted the return, and filed an affidavit to the effect that he is advised that there is not sufficient in law in the return to the said writ to justify his detention. "That he is not, nor has he

ever been, guilty of the crime alleged against him in the pretended warrant of commitment, set up in said return, nor of any other offence against the laws of Washington Territory." The proceedings before the Police Judge were had under sections 665 to 671 inclusive. of our Criminal Practice Act, which provides, that a person charged in any State or Territory of the United States, with treason, felony, or other crime, who shall flee from justice, and be found within this State, shall, on demand of the Executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime ; that any Magistrate may issue a warrant for the apprehension of such fugitive ; that the proceedings in such case, shall be the same as in other cases before a Magistrate, except that an exemplified copy of an indictment found, or other judicial proceedings had against the fugitive in the State or Territory in which he is charged, with crime, may be received in evidence ; and if the Magistrate is satisfied after examination, that the person arrested has committed the crime charged, he shall by warrant, commit him to proper custody within his county, for a reasonable time, to be stated, to enable the fugitive to be arrested on a warrant to be issued on the requisition of the Governor of the State from which he fled, unless he give bail, and the District Attorney is required to give notice to the Executive of such State or Territory, of the arrest and detention of such fugitive.

The case has been ably presented; indeed every American authority material to the question has been cited, referred to, analyzed, or commented upon by counsel.

It was conceded on the hearing, that no copy of indictment was produced before the Police Judge, nor any copy of affidavit made before a magistrate of said Territory, charging the petitioner with any

crime, that the proceedings before him were entirely oral.

The counsel for the petitioner moves for his discharge on the following grounds: 1st, That the Police Judge had not jurisdiction; 2d, The provisions of our Criminal Practice Act, Sections 665 to 671, above referred, are inoperative and void; and, 3d, Congress has exclusive power to enact laws in reference to fugitives from justice, and it is not competent for State legislation to add to the provisions of Congress.

The Constitution of the United States, Act 4, Section 2, provides that, "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authorities of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Act 6, Section 36, of said Constitution, also provides that, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

On the 12th day of February, 1793, Congress passed an act, which is still in force, entitled "*An Act respecting fugitives from justice, and persons escaping from the service of their masters*, which provides as follows:

"§ 1. That whenever the Executive authority of any State in the Union, or of either of the Territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the Executive authority of any such State or Territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or

an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the Executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged, and all costs or expenses incurred in the apprehending, securing and transmitting of such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

"§ 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled. And if any person or persons shall by force set at liberty, or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

"§ 3. That when a person held to labor in any of the United States, or in either of the Territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territories, the person to whom such labor or services may be due, his agent or attorney is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any Judge of the Circuit or District Courts of the Uni-

ted States, residing or being within the State, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested, doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State or Territory from which he or she fled."

The third section of the above act is here quoted, that the applicability of the decisions referred to may be more apparent.

In 1832, in the matter of John L. Clark, [9 Wend., 212,] who was arrested as a fugitive from justice from Rhode Island, and brought before the Supreme Court of New York on *habeas corpus*, Chief Justice Savage said : "But under our Federal Government, this matter has been regulated, and we are not left to the uncertainty arising from an inquiry in one State into the particulars of an offence committed in another. The Constitution of the United States provides that 'a person charged in any State with treason,' etc., quoting Art. 6, § 2, as above. "Here then is the law on the subject—a positive regulation, and tantamount to a treaty stipulation ; and we are not to resort to the comity of nations for our guidance. Every person who is *charged* with an offence in another State, shall be delivered up. It is not necessary to be shown that such person is guilty ; it is not necessary, as under the comity of nations, to examine into facts alleged against him constituting the crime ; it is sufficient that he is *charged* with having committed a crime.

"But *how charged?* The law of Congress has answered this question as follows," quoting the first section of the Act of 1793, above cited:—

Chief Justice Nelson, (now Justice of the Supreme Court of the United States,) in Jock vs. Martin, 12 Wend., 311, a case before the Supreme Court of New York, involving the question as to which was the paramount law in reference to the surrender of fugitive slaves, the third section of the Act of Congress of 1793—above quoted—or a provision in the Revised Statute of that State, on the same subject, says: "The counsel for the plaintiff in error contends the mode of making the claims, and of delivering up the fugitive, is a subject exclusively of State regulation, with which Congress had no right to interfere; and upon this view, the constitutionality of the law of this State is sought to be sustained. I apprehend it can be defended on no other ground than the one taken; for if the power of the State to legislate on this subject is only concurrent with Congress, after the exercise of it by that body in enacting the law of 1793, it would be incompetent for the State authorities to act in the matter. That law must be paramount, from necessity, to avoid the confusion of adverse and conflicting legislation. So far as the States are concerned, the power, where thus exercised, is there exhausted; and though they might have desired a different legislation on the subject, they cannot amend, or qualify, in any manner after it. This rule, as I understand it, settled by authority, in regard to the construction of concurrent powers of legislation in the States, and which is conceded to be binding upon the State tribunals, is a question arising under the Constitution and laws of the United States. This principle is undoubtedly essential to peace and harmony in the action of the two governments. If the power of each, in its sphere, was exclusive throughout, there would be no reason or necessity for its applica-

tion, for then there could be no collision without usurpation. But as there is a large mass of concurrent powers belonging to each in the arrangement of the system, confusion would have inevitably followed their operations, if one of them had not been made paramount. It was therefore provided."

[Here the learned Jurist quotes Art. 6, Section 36, of the Federal Constitution—above set forth, and continues—]

"Whenever Congress can lawfully act under the Constitution, and do act, their judgment and discretion are supreme over the subject under this provision; and in the exercise of concurrent powers, the States must necessarily be subordinate. Neither can the States exercise a concurrent power in conjunction with Congress, without their express permission; for the right to do so would be in derogation of their paramount authority, and lead to all the evil it was designed to avoid. Though the act of the State might not be in direct repugnance to the legislation of Congress, it does not follow it is not so in legal effect; for it has been correctly said, that the will of Congress may be discovered as well by what they have not declared as by what they have expressed; that two distinct wills cannot at the same time be exercised in relation to the same subject effectually, and at the same time be compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they differ."

The same principles are sustained by the Supreme Court of the United States. *Prigg vs. the Commonwealth of Pennsylvania*, 16, *Peters*, 539, in which Judge Story wrote the principal decision. *Sturges vs. Crownenshield*, 4 Wheaton, 122, in an opinion by Chief Justice Marshall. *Ogden vs. Saunders*, 12, *ib.* 213; *Boyle vs. Zacharie*, 6, *Peters*, 348.

The Federal Constitution having given Congress the *exclusive* power to legislate regarding the surrender of fugitives from justice; that power *having been exercised* by Congress, it follows that our statute, under which the Police Court acted, is inoperative and void, and the petitioner is illegally held by the commitment and the proceedings thereunder.

Therefore, the petitioner, Thomas Donahue, is discharged from custody.

NOTE.—We have given only a synopsis of the exhaustive and elaborate brief of the learned counsel for the petitioner; and have not been furnished with a copy of the brief of counsel for the State. It would seem, however, from an examination of all the authorities cited by the counsel for petitioner, that it is established:—

1st. That the power to legislate concerning the recapture of fugitives from justice, between the States or Territories of the United States, is vested in Congress, by the Constitution.

2d. That all proceedings concerning the demand, *subsequent* arrest and return of such fugitives, must be regulated by act of Congress.

3d. That such act of Congress is conclusive, and no State statute can impede, contravene, or aid it.

But it is not so clear upon the authorities referred to by Col. James, or upon principle, that a State has no right to legislate concerning the arrest and confinement, for a reasonable period, of a class of persons *described* as "fugitives from justice," found within her borders. It is undeniable that the first duty of a government, is to protect its own citizens and to maintain peace, and order and security of life and property, within the limits over which it holds jurisdiction.

The object of all punitive law in Christian nations, is not revenge, or punishment, *per se*, for crimes committed, but the *prevention* of crime.

All persons, whether citizens or aliens, ought to be subject to such restraint of their personal liberty, by the law, as may be necessary to the peace and security of the inhabitants of the State or community wherein they may be. To this end, statutes are enacted, authorizing the arrest and confinement of persons, against whom there are reasonable apprehensions that they will perpetrate crime. Now is it not competent for the Legislature to determine, what character or class of persons it shall deem likely to commit crime, and to provide how the fact, that they are dangerous persons, and likely to commit crime, shall be ascertained?

Is not this kind of legislation within the proper scope of Police regulations for the security of peace and order in the State?

Why, then, may not the Legislature enact, that a person charged with the commission of crime in another State or Territory, shall upon the proper affidavit be arrested, and held for examination, and upon such examination if it appear, *prima facie*, that the charge is true, be held in custody or by bail, (in default of jurisdiction to try for the offence), until the executive of the foreign State or Territory, where the crime appears to have been committed, be notified, to the end, that he may in the manner provided by act of Congress, obtain the removal of such dangerous person from the State where he was apprehended. Certainly such enactment cannot be said to be in contravention, or hindrance of the act of Congress cited; it may be indirectly in aid thereof, but the object of the State Legislature, by such enactment, being for another and different purpose to that intended by Congress, and that purpose being strictly within the limits of its power, what rule of construction can be invoked, that shall make the legislators powerless to protect the citizens of their own State from the thieves and murderers of other States, because it will generally happen that by such enactment, aid in the recapture of fugitives from justice will be afforded to the authorities of other States and Territories. Suppose such a fugitive should be arrested for the actual commission of misdemeanor in this State, and being so under arrest, knowledge thereby of his whereabouts comes to the executive of the State from which he has fled, (being under indictment for a crime, say murder, committed therein,) and he makes the proper requisition for said fugitive upon the Governor of California, and he upon the officers having the fugitive in custody; now it happens, that the arrest for the misdemeanor, has aided the authorities of the sister State, in the detection, and arrest of this fugitive. Shall the law under which he was arrested fall before the act of Congress, because it happens to aid in effectuating the purpose of that act? The power being in the Legislature, to enact laws for the arrest of persons who will probably commit crime, as well as those who have done the criminal act, wherein is the distinction between the case under discussion, and the case supposed; this view is supported by all the cases noted in the brief of Col. James, "per contra," and is not directly denied, except in two of the cases cited for the petitioner, if we have correctly apprehended the points determined in said cases. It seems also to follow the rules of construction, cited to another point, at the close of the brief of Counsel for petitioner, that is to say in brief, that such construction shall be given to an act apparently in conflict with another act, as that they shall both stand and be consistent, if it can be done. Whether the particular act of the Legislature passed upon by the Court, is so drafted as to admit the construction indicated, we express no opinion, we raise the doubt, as to the general principles contended for, in the brief of the counsel for petitioner. We shall probably in a future number re-examine this subject more at length.

O.

[From the American Law Review.]

The present system of law reports is published under the supervision of the Council of Law Reporting, which owed its existence to a scheme adopted at a special meeting of the Bar, in November, 1864.

"The object of the scheme is the preparation, under professional control, through the medium of the Council, by barristers of known ability, skill, and experience, acting under the supervision of editors, of one complete set of reports, to be published with promptitude, regularity, and at moderate cost, in the expectation that such a set of reports will be generally accepted by the profession as sufficient evidence of Case Law; so that the judge in decision, the advocate in argument, and the general practitioner in the advice he gives to his client, may resort to one and the same standard of authority."

The need of a reform was great. The reporters held unofficial and irresponsible situations; there were often more than one set of reporters for the same court and at the same time; and the reports were published at unwieldly and useless length, and at a very high cost.

With few exceptions, the gentlemen who were publishing reports at the time of the inauguration of this scheme came cordially into it; and many of them continue their labors under the supervision of editors appointed by the Council. The reporters of the Queen's Bench and Mr. Brewar, the reporter of the decisions of the Master of the Rolls, are the only ones who have persistently refused to relinquish their separate series; but it is hardly probable that they will retain sufficient support to enable them to continue their publications.

The law reports are published in three series,—the Equity Series, the Common Law Series, and the Appellate Series.

1. The Equity Series, published in monthly parts, contains the decisions of the Lord Chancellor and the Lords Justices in the Court of Appeal, in Chancery, Lunacy, and Bankruptcy; and also the decisions of the Master of the Rolls and the three Vice-Chancellors. The cases in the Court of Appeal are paged and indexed so as to bind into one volume for the year. The decisions of the Master of the Rolls and of the Vice-Chancellors (being judges of co-ordinate authority) are paged together, and

will be separated into as many volumes in the year as may be found convenient, and each volume separately indexed: it is hoped they will not exceed two volumes a year.

2. The Common Law Series, also published in monthly parts, comprises the decisions of the Queen's Bench, Common Bench, and Exchequer, including writs of error and appeals to the Exchequer Chamber (the writs of error and appeals from each court being placed with the cases in that court); also the decisions of the Courts of Probate, Divorce, and Matrimonial Causes; those of the Admiralty and Ecclesiastical Courts, and those of the Court of Criminal Appeal. This series will be paged and indexed so as to bind into separate yearly volumes for the Queen's Bench, Common Bench, and Exchequer, respectively; one volume for Probate, Divorce, and Matrimonial Causes; and one for the Admiralty and Ecclesiastical Causes. The cases in the Court of Criminal Appeal will be paged and indexed separately, so as to bind up into a volume when of sufficient bulk.

3. The Appellate Series comprises the decisions of the House of Lords and the Privy Council. This series is paged and indexed so as to bind up into separate volumes, for the English and Irish Appeals; the Scotch Appeals and Divorce cases; and the Privy Council cases. Two parts only of this series have hitherto appeared.

The mode of citation of the law reports, is as follows:—

Series	Court	Citation
Equity Series	CHANCERY APPEALS (L. C. & L. JJ.)	Law Rep. Ch. Ap.*
	EQUITY CASES (M. R. & V. CC.)	Law Rep. Eq.
Common Law Series	QUEEN'S BENCH	Law Rep. Q. B.
	COMMON PLEAS	LAW REP. C. P.
	EXCHEQUER	Law Rep. Ex.
	CROWN CASES REVIEWED . . .	Law Rep. C. C.
	PROBATE, DIVORCE, & MATRIMONIAL	Law Rep. P. & D.
	ADMIRALTY AND ECCLESIASTICAL	Law Rep. Ad. & Ecc.
Appellate Series	HOUSE OF LORDS	Law Rep. H. L.
	HOUSE OF LORDS SCOTCH APPEALS	Law Rep. H. L. Sc.
	PRIVY COUNCIL	Law Rep. P. C.

The following Digest of cases from the foregoing reports are selected from the *American Law Review.*

Administration.

1. The executor being out of the jurisdiction, administration

* Though this is announced as the authorized mode of citation, the form which seems to be actually employed in the Law Reports themselves is, "Law Rep. Ch.;" and this has been adopted in the following digest.

with the will annexed was granted to the guardian of infant legatees, limited to their interest: *Goods of Hampson*, Law Rep. 1 P. & D. 1.

2. If the estate of a deceased consists of his share in a business which he was carrying on in partnership at the time of his death, and which the surviving partner continues to carry on, an administrator *pendente lite* will not be appointed against the wishes of such partner, unless a strong case is made, that he is dealing improperly with the business: *Howell* v. *Wilts*, Law Rep. 1 P. & D. 103.

3. The Court will not discharge original sureties to an administration bond, or allow other sureties substituted: *Goods of Stock*, Law Rep. 1 P. & D. 76.

Bill of Lading.

1. A bill of lading on goods, making them deliverable "to order or assign," was indorsed by the consignor in blank, and deposited with a banker as security for an advance; and, on repayment of the advance, was re-indorsed and delivered back to the consignor: *held*, that the consignor could sue the ship-owners for a breach, whether occurring before or after the re-indorsement of the bill of lading: *Short* v. *Simpson*, Law Rep. 1 C. P. 248.

2. If a bill of lading provides that, as soon as the ship is ready to unload the whole or any part of the goods (sixty-five pipes of lemon juice), the consignee is bound to be ready to receive the same from the ship; and, in default, the master may enter the goods, and land or lighter them at the consignee's risk and expense: the contract is divisible, and if, after part of the goods have been landed by the ship-owner, but not before, the consignee offers to receive the remainder, the ship-owner is bound to deliver them to him, unless he has been prejudiced in the delivery of the remainder by the consignee not being ready to receive the whole: *Wilson* v. *London, Italian, & Adriatic Steam Nav. Co.*, Law Rep. 1 C. P. 61.

Carrier.

1. A by-law of the defendants provided, that no passenger should enter a carriage without obtaining a ticket, which would be furnished on payment of the fare, and was to be shown and

delivered up on demand. The plaintiff took tickets for himself and servants by a particular train, which was afterwards cut in two, the plaintiff being in the first train with all the tickets. The defendants refused to carry the servants in the second train, they being unable to show tickets: *held*, that the defendants, having contracted with the plaintiff, and delivered to him the tickets, could not justify their refusal under the by-law: *Jennings* v. *Great N. Railway Co.*, Law Rep. 1 Q. B. 7.

Damages.

1. In an action for breach of promise, if the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating damages, they may consider the altered social position of the plaintiff in relation to her home and family through the defendant's conduct: *Barry* v. *De Costa*, Law Rep. 1 C. P. 331.

Evidence.

1. Entries of pedigree in a family Bible or Testament, produced from proper custody, are admissible in evidence, without proof of handwriting or authorship: *Hubbard* v. *Lees*, Law Rep. 1 Ex. 255.

2. Certificates of births, baptisms, &c., are admissible in evidence, without proof of the identity of the persons mentioned with the persons as to whom the fact recorded is sought to be established: *Hubbard* v. *Lees*, Law Rep. 1 Ex. 255.

False Pretence.

1. A person may be convicted of obtaining goods on false pretences, though he intended to pay when he should be able: *The Queen* v. *Naylor*, Law Rep. 1 C. C. 4.

Frauds, Statute of.

1. If a landlord verbally agrees to grant his tenant a lease for a new term at an increased rent, but dies before executing the lease, payment of a quarter's rent, at the increased rent, before his death, is sufficient part performance to take the case out of the statute of frauds: *Munn* v. *Fabian*, Law Rep. 1 Ch. 35.

Highway.

1. Horses grazing on the side of a turnpike, under control of a man in charge of them, cannot be impounded as "wandering, straying, or lying" about the road, under 4 Geo. IV. c. 95, § 75 *Morris* v. *Jeffries*, Law Rep. 1 Q. B. 261.

SELECTIONS OF RECENT AMERICAN DECISIONS.

Banks.

" See Taxation."

Carrier.

1. Where a trunk was carried on a steamboat, and left at the baggage room door, without obtaining a check or calling the baggage master's attention to it; *held*, that there was not such a delivery as to make the steamboat company liable: *Ball* v. *New Jersey Steamboat Co.*, 1 Daly, N. Y. Com. Pleas, 491.

2. Where a passenger went on board of a steamboat, and placed his valise in a state room, the key of which was given to him at the time of his paying for his passage, and the valise was stolen from the state room, while the door was locked, during the owner's temporary absence therefrom; *held*, that the steamboat company was liable for the loss of the valise: *Mudgett* v. *Bay State Steamboat Co.*, 1 Daly, N. Y. Com. Pleas.

3. In an action against a carrier to recover the value of a package; *held*, that the plaintiff could not recover, it appearing that the package was taken from the servants of the defendants by a band of John Morgan's soldiers of the confederate army: *Bland* v. *Adams Express Co.*, 1 Duvall (Kenn.) Rep. 232.

See "Vendor and Purchaser," 2.

Challenge.

See "Jurors."

Charitable Trusts.

Where a bequest was made of an annual sum, out of the income from real estate, for fifty years, to trustees, to be invested by them and accumulated during that time, and then applied to establish a charity; *held*, that the bequest was valid, even though the accumulation for so long a period could not be allowed: *Odell* v. *Odell*, 10 Allen (Mass.) Rep.

Clubs.

Where two members of a private, social club, were sitting in the club house, and a third member came in, and used insulting language, understood by one of the two to be applied to himself, who thereupon struck such party; *held*, by a divided court, that the member striking could not be expelled from the club under a by-law giving the majority the power of expulsion:— *Evans* v. *The Philadelphia Club*, 50 Penn. State (14 Wright) 107.

Constitutional Law.

Sec "LEGISLATURE," 1, 2, "SOLDIERS VOTING," "TAXATION," "STAMP," 1.

Contract.

Where a contract was made for the payment of $800, $500 to be paid in gold; *held*, in an action to recover the amount due on the contract, that the judgment must be for $800, though gold was at a premium: *Buccheygen* v. *Shulter*, 13 Mich. (1 Meddaugh) Rep. 420.

See "ILLEGALITY," "FRAUDS, STATUTE OF," "STERLING MONEY," "STAMP."

Due Process of Law.

See "STAMP."

Frauds, Statute of.

The defendant had retained the plaintiff as his attorney in any litigation that might grow out of a conveyance to him by A., who had failed, and, in consideration of such retainer, had promised the plaintiff verbally to pay him one-half of a debt of $300 or $400, due the plaintiff from said A., and had also promised to pay the plaintiff for his services, if he performed any; *held*, that the promise to pay the debt of A., was within the statute of frauds: *Fullam* v. *Adams*, 37 Vermont, 391.

Illegality.

In an action on a contract for the sale of confederate notes; *held*, that the court would not help either party to enforce the contract: *Laughlin* v. *Dean*, 1 Duvall (Keen.) Rep. 20.

Insurance.

Where the burning of a house was occasioned by the burning of an adjoining bridge, by order of Major Gen. Couch, to prevent the advance of an armed force of the public enemy; *held*, that it was not "a loss by fire occasioned by mobs and riots," within the exceptive clause of a policy of insurance: *Harris* v. *The York Mutual Ins. Co.*, 50 Penn. State, (14 Wright), 341.

See "USAGE."

Jurors.

That a juror has formed a partial opinion as to the guilt or innocence of the prisoner from rumors heard in the street, but

not a positive opinion, is no ground for challenge: *Holt* v. *The People*, 13 Mich. (1 Meddaugh) Rep. 224.

Legal Tender.

That portion of the Revenue Act of Congress, which makes paper currency a legal tender; *held*, to be unconstitutional and invalid: *Van Husen* v. *Kanouse*, 13 Mich. (1 Meddaugh) Rep. 303.

Legislature.

1. An action of the Legislature cannot be declared void on the ground that a portion of the members voting for it who were not legally elected: *The People* v. *Maluney*, 13 Mich. (1 Meddaugh) Rep. 481.

2. Where a bill has passed both houses of a Legislature, been signed by the appropriate officers, and sent to the Governor for approval, it cannot be recalled except by the joint action of both houses of the Legislature: *The People* v. *Devlin*, 33 N. York (6 Tiff.) Rep. 269.

Negligence.

1. In an action against a warehouseman to recover for the loss of goods intrusted to his custody; *held*, that the burden of proof lies on him to show that the loss was not occasioned by his negligence: *Arent* v. *Squir*, (1 Daly) N. Y. Com. Pleas, 347.

2. A party who has suffered injury from the insufficiency of a highway, is not bound to establish in the outset, as a distinct affirmative proposition, that he was guilty of no negligence on the occasion: *Hill* v. *New Haven*, 37 Vermont, 501.

See "TELEGRAPH," 1, 2, 3; "CARRIER," 1, 2, 3; "RAILROAD."

Railroad.

Where a horse railroad company, which does not engage to carry baggage, has a regulation that its agents shall take charge of and keep safe property inadvertently left in the cars, it is liable if one of its agents deliver such property to the wrong person, unless he has exercised ordinary care in making such delivery: *Morris* v. *Third Avenue R. R. Co.*, (1 Daly) N. Y. Com. Pleas, Rep.

Seal.

It is not sufficient that the seal of a corporation be impressed on the paper alone, without wax or other adhesive substance: *Bates* v. *Boston and N. Y. Central R. R. Co.*, decided at the March term, 1865, of the Mass. Sup. Court, and not yet reported.

Slavery.

The following case is worthy of notice as being the last, in all probability, of a series of cases which must now have become obsolete.

The plaintiff, a woman "of fair complexion, blue eyes, and flaxen hair," was adjudged a slave, the Court holding that the presumption of freedom arising from her color must be proof of servile origin: *Morrison* v. *White*, 16 Louis. Ann. Rep. 100, for the years 1861–62.

Slander.

In an action of slander, the defendant may prove the truth of the words in justification, although they were spoken maliciously, and without any reason to suppose they were true: *Foss* v. *Hildreth*, 10 Allen, 76.

Soldiers Voting.

The law in Michigan, allowing soldiers to vote, discussed at large, and held to be in violation of the Constitution of the State: *Twitchell* v. *Blodgett*, 13 Mich. (1 Meddaugh) Rep. 127.

Stamp.

1. The act of Congress, permitting a stamp to be affixed to an instrument subsequent to its execution, thereby rendering it valid, does not conflict with that clause in the Constitution which forbids that any one shall be deprived of property, &c., except by due process of law: *Gibson* v. *Hibbard*, 13 Mich. (1 Meddaugh) Rep. 214.

2. No United States revenue stamp is required on an award of arbitrators in order to make it valid: *Cilley* v. *Gray*, 37 Vermont, 136.

Sterling Money.

Where a contract was made for a certain sum of money, which might, at the election of the party who was to receive it, be expressed in currency of Great Britain, and no standard was agreed upon by the parties at which the pound sterling should

be reckoned; *held*, that it should be reckoned at $4,84: *Commonwealth* v. *Haupt*, 10 Allen, 38.

Taxation.

Shares in national banks are subject to taxation by the State in which the bank is located: *Utica* v. *Churchill*, 33 N. Y. (6 Tiffany) 161.

NOTE.—Though this judgment was reversed in the Supreme Court of the United States, the majority of that court agreed with the State tribunal on the main question.

Telegraph.

1. Through a mistake of the defendants, a telegraph company sent a telegram by the plaintiff to his agent to buy "A, stock at the brokers' board," was altered so as to read, buy "B, stock at the brokers' board," which was done accordingly; the plaintiff, being immediately apprised, corrected the error and repeated his order; the agent who received the second order after the adjournment of the board, sold the B, stock at a loss, and bought A, stock at a higher price than he would have had to pay at the board; *held*, that the defendants were liable for the additional amount that had to be paid for the A, stock, but not for the loss on the B, stock, which was in law to be considered as bought on their account, and therefore not to be sold without notice to them; *Rittenhouse* v. *Independent Line of Telegraph*, 1 Daly, N. Y. Com. Pleas, 474.

2. A clause in the regulations of a telegraph company that the company will not be responsible for delay in transmitting a message, does not apply to delay in delivering a message after transmission; and where the plaintiff, by such delay, lost an opportunity of attaching a house of greater value than his debt, and afterwards, his debtor having in the mean time become insolvent, received but a small dividend of his debt; *held*, that the defendants were liable for the amount of the debt less the dividend so received: *Bryant* v. *American Telegraph Co.*, 1 Daly, N. Y. Com. Pleas, 575.

3. Delay or errors in transmitting a telegram are *prima facia* presumed to arise from the negligence of the company; the condition that the company will not be responsible, unless for repeated messages, must be brought to the notice of the sender in order to bind him; a telegraph company receiving the whole

compensation, and undertaking to send the message over a series of connecting lines beyond their own, is answerable for an error whenever occurring; and where a telegraph company delivered a telegram, which they had erroneously transmitted, to a person, whereby such person was induced to buy goods at a price beyond that really authorized by the sender, and suffered loss in consequence, the company was held liable to make good such loss: *De Rutte* v. *N. Y. Albany and Buffalo Telegraph Co.*, 1 Daly, N. Y. Com. Pleas, 547.

Usage.

The plaintiffs insured their vessel from New York to Buenos Ayres and Monte Video, one or both, and thence to ports of discharge in the United States, with the following indorsement on the policy: "Liberty is given to deviate by going to port or ports in Europe, by paying an equitable premium therefor."—The vessel sailed from New York to South America in 1854; thence to Malta and Constantinople, with a cargo, which was there disposed of. The master then obtained a charter from the French government to run between Constantinople and the Crimea, and made one trip. On the return to Constantinople, the vessel sailed for Smyrna, seeking business, where she took in a cargo for Boston, and was lost on the voyage home, on the American coast. The defendant contended that *the voyage from Constantinople to the Crimea and back was a deviation*, and avoided the policy: *held*, that evidence, offered on the part of the plaintiffs, of a usage permitting the making of intermediate voyages under such circumstances, was incompetent: *Seccomb et. al.* v. *Provincial Ins. Co.*, 10 Allen, 305.

NOTE.—The opinion of the Chief Justice in this case, contains an extended discussion of the general topic of usages, where it is sought to modify or change written contracts by evidence of usage or custom.

Vendor and Purchaser.

1. Where goods are delivered to a carrier named by the purchaser, with instructions to collect the price on delivery, the goods remain at the risk of the seller, during the course of transportation: *Baker* v. *Bourcicault*, 1 Daly, N. Y. Common Pleas, 23.

2. Where the purchaser of goods requests the seller to send them to him by a carrier, a contract made by the seller with the carrier, limiting the latter's liability, binds the purchaser:—*Moriarty* v. *Harnden's Express*, 1 Daly, N. Y. Com. Pleas, 227.

[Not yet Reported.]

Supreme Court of Missouri.

HANNIBAL AND ST. JOSEPH RAILROAD CO. *v.* HATTIE HIGGINS BY ELIZA HIGGINS, HER GUARDIAN.

Prima Facie Presumption of Cause of Injury to Passengers.—The Statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *prima facie* results from want of due care in the company.

Proof of the Cause of the Injury admissible.—This presumption is not conclusive under the statute, but may be rebutted by evidence of the cause of the injury.

Distinction between Employees of the Company and Passengers.—One who had been in the employment of the company as an engineer and brakesman, until his train was discontinued, a few days previous, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employees of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid fare and taken a seat in the passenger-car.

Effect of Free Passage or Change of Position upon the Rights of Passengers.—It will not deprive of his remedy a passenger who comes upon the train in that character, and is so received, that he is allowed, as matter of courtesy, to pass free, or to ride with the employees of the road in the baggage-car. But a passenger who leaves the passenger-carriages to go upon the platforms or into the baggage-cars, unless compelled to do so for want of proper accommodations in the passenger-carriages, or else by the permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedies against the company for injuries received, unless upon proof that his change of position did not conduce to the injury: 5 *Am. Law Reg.*, *U. S.* 715.

Supreme Court of Michigan.

THE PEOPLE *v.* WILLIAM DEAN.

A person having less than one-fourth of black or African blood is a *white* person within the meaning of the Constitution of Michigan, and entitled to vote if otherwise qualified: *Ib.* 721.

Superior Court of Cincinnati.

OHIO AND MISSISSIPPI RAILROAD CO. *v.* INDIANAPOLIS AND CINCINNATI RAILROAD CO.

A receiver appointed by the Circuit Court of the United States for the Southern District of Ohio, to take possession of a railroad and its effects, may sue in this court, upon a contract made by that corporation in the corporate name of the railroad, without disclosing in the petition his own name as receiver.

A foreign corporation, having no charter from the State of Ohio, authorizing it to construct and operate a railroad in this State, cannot, by a transfer of a portion of a railroad already constructed in the State by legal authority, acquire a right to use and operate such railroad within this State.

The plaintiffs, being authorized to construct and operate a railroad from Cincinnati to Vincennes, and the defendants, being authorized to construct and operate a railroad from Indianapolis to Lawrenceburg, of a different gauge, entered into a contract whereby the defendants, in consideration of being allowed to lay a third rail on the road of the plaintiffs from Lawrenceburg to Cincinnati, and of the agreement of the plaintiffs to furnish motive power for hauling the cars of the defendants on that part of the road, agreed, among other things, to lend to the plaintiffs $30,000, for the purpose of erecting a depot for the plaintiffs in Cincinnati; to erect a depot at a cost of $15,000, on lands of the plaintiffs in Cincinnati, to become the property of the plaintiffs at the expiration of the contract; to form no connections at or beyond Lawrenceburg prejudicial to the plaintiffs; and to give the plaintiffs exclusive control of the employees of the defendants while on the road of the plaintiffs. *Held*, on the construction of the charters of the plaintiffs and defendants, that such contract was beyond the competency of the contracting parties, and was void.

The contract also provided that the defendants should have

the use of a depot and certain grounds in Cincinnati, for unloading goods and lumber, for thirty years. *Held*, that this created an easement in the land, and was, in connection with the laying and keeping up the third rail, in substance a lease, which the plaintiffs had no authority to make, and that it being for more than three years, was also invalid under the Statute of Frauds, for the want of legal acknowledgment. *Held*, also, that the defendants having as a foreign corporation no right to accept a lease of a railroad in Ohio, the plaintiffs could not have had a specific performance of the agreement, the remedies of the parties not being mutual: *Ib.*, 733.

Supreme Court of Pennsylvania.

HOFFMAN *v.* BECHTEL.

Where a creditor employs legal process against a debtor in the usual way and without unnecessary delay, it is *prima facie* proof of such diligence in collecting his debt as will give him a claim against a guarantor.

But this presumption may be overcome by proof that the creditor had special knowledge of assets or opportunity of collecting his debt, and that his failure to do so was the result of bad faith, or neglect to do what a prudent creditor who had no other security but the debtor's obligation would have done under the circumstances: *Ib.*, 745.

Superior Court of Chicago.

GEORGE SHERWOOD ET. AL. *v.* ALFRED H. ANDREWS ET. AL.

A trade-mark, which is merely descriptive of the kind of articles or goods to which it is applied, is not a trade-mark in legal sense, and is not entitled to protection as such.

A trade-mark, to entitle an assignee to protection in its exclusive use, must indicate by appropriate words, as "executor," "assignee," or "successor," his relation to the original proprietor.

The trade-mark of a defunct corporation does not descend to the stockholders at the time of its dissolution.

Court of Exchequer.

WILSON *v.* THE NEWPORT DOCK COMPANY.

The defendants, owners of docks in a river, agreed with the plaintiff, a shipowner, to receive his ship into their docks.—When the time came for receiving the ship, they were unable to do so. The ship lay in the river, and, as the tide fell, she stranded, broke her back, and was seriously damaged. In an action for the breach of the contract to receive the ship into the dock, the plaintiff sought to recover for the injury to the ship as special damage. The judge asked the jury, first, whether there was a place of safety to which the ship might be taken; and, if so, secondly, whether the captain or pilot had been guilty of negligence in not taking her there. The jury gave no answer to the first question, but, to the second, answered that the captain and pilot did the best they could under the circumstances, and were neither of them guilty of negligence. The judge thereupon directed a verdict for the plaintiff for the damages claimed.

Held, (per POLLOCK, C. B., CHANNELL and PIGOTT, BB.), that, upon the finding of the jury, the court could not decide whether the plaintiff was entitled to the damages claimed or not.

Held, (per MARTIN, B.), that the plaintiff was entitled to the damages claimed.

Hadley v. *Baxendale*, 9 Exch. 341, commented upon: 5. *Am. Law Reg.*, 748.

Court of Common Pleas.

SMITH *v.* THACKERAH AND ANOTHER.

The plaintiff was entitled to lateral support for his land, but not for the wall upon it. The defendant dug a well in his own land, adjoining the land of the plaintiff, and when he no longer required it, filled it up, but the material used for the filling up sunk. The consequence was a subsidence of earth towards the place where the well had been, and this subsidence included particles of the plaintiff's earth, and caused the fall of the plaintiff's wall; but there would have been no appreciable injury to the plaintiff's land if the wall had not been upon it. *Held*, that there was no cause of action: *Ib.*, 761.

We have received the first number of a new law Periodical—*The American Law Review*—published quarterly, at Boston. The attention of the profession is called to it; it will be well deserving of their patronage, if the subsequent numbers shall fulfil the promise of the first. We have taken the liberty of making several quite extended extracts from it, of matters which we thought would be of peculiar interest, as well as of permanent use to the profession—for instance, the *List of American and British Judges*, and the *Account of the New System of Law Reporting in England.* The first number contains. besides a large quantity of other matter, several original essays on different topics of law.

The first article is a discussion of *the Natural Right of Support from Neighboring Soil.* It is an elaborate and extensive examination of the authorities on the subject. But we have one fault to find with it—one, which we must bring to the charge of many other essays, and also of some judicial decisions. It concerns the citation of authorities; or more properly, *the manner of referring to authorities.* The fault consists in referring to an authority, after having once properly cited it from book, page &c., by the adverb *supra*, or *ubi supra.* For instance, on page 22, we find the case of *Foley* v. *Wyeth* cited by the words "*ubi supra.*" Suppose we wish to ascertain where that authority is to be found. We turn back, examining every page with great care, lest we may overlook the previous citation, until we come to the 17th page, where our eyes are, at length, gratified with the sight of the same citation *verbatim et literatim*, "*Foley* v. *Wyeth ubi sup.*" We commence our search again, and "advance backwards" until we come to the 15th page, where, to our perplexity, we meet, mixed up with various other citations, with the same *Foley* v. *Wyeth, ubi sup.* But the case must be found, and we begin once more. We trace each page carefully till we come to the 13th, where the same unsatisfactory citation once more greets our eyes, of *Foley* v. *Wyeth, ubi sup.* But, not to be baffled, we begin again, and run back to page 11, where we again find *Foley* v. *Wyeth, ubi sup.* Starting again, we trace back page by page till near the bottom of page 8, we see for the fifth time the same old *Foley* v. *Wyeth, ubi sup.* But, at last, casting the eye further up on the last page, we overtake the object of our long search, and learn that the case of *Foley* v. *Wyeth* is reported in 2d Allen, p. 131.

There are numerous instances of a similar character in the citations of the same article. Now, although these cannot be called errors, yet this manner of citing authorities is, especially if a person is in haste to refer to the authority, both annoying and provoking. Perhaps, it might be said that it is adopted for the purpose of saving room and time, and by way of abbreviation. But as a general thing, it requires no more

time or spaee to write the true reference in each case, than is required by the method whieh we condemn. And besides, it is very well to adopt this mode when the first referenee to which the *ubi supra* relates, is to be found on the same page, or even on the page preeeding. The remarks above made in respeet to the article in the *Law Review*, are applicable in almost innumerable other instanees of judieial opinions and law essays. And it is because we have been so frequently heretofore annoyed by such referenees that we have taken this occasion to raise our voice against the evil.

The next original article in the *Law Review* is an essay on "Final Proeess in the Courts of the United States as affected by State Laws." The writer explodes the doctrine that the laws of the State in which the eontract is made, form a part of the contract. An interesting argument and well deserving of perusal by the profession. So far, however, as concerns the typography we cannot commend it. It eontains numerous typographieal mistakes of the worst kind—such as *mortgagor* for *mortgagee*—*rule* for *sale*—*disposition* for *dispensation*, &c., which mar the otherwise beautiful exeeution of the work.

The *Review* publishes, also, a Paper on the Testimony of Experts, read by Professor Washburn, of Harvard Law Sehool, before the American Aeademy of Arts and Sciences, which we reeommend to our readers as peeuliarly deserving of thorough examination ; and likewise another artiele giving an aceount of the eelebrated trial in England of *Ryves* v. *The Attorney General*, the plaintiff in whieh ease elaimed to be one of the Royal Prineesses of England. This article contains a portion of what may be called the romance of the law, and is more interesting reading than a romance.

We commend the *Law Review* to the patronage of the profession. Published at Boston by *Little, Brown and Company*. B.

American Law Register.—The October number of this valuable law periodieal has been reeeived. In addition to the usual interesting matter, this number contains a letter from Chief Justiee Appleton, of Maine, to John Q. Adams, Esq., ehairman of the Committee on the Judiciary of the Massachusetts Legislature, on the subject of the testimony of defendants in eriminal prosecution, together with some observations of Judge Redfield, on the same subject. While the former strongly approves of this innovation introduced into the legislation of some of the States, including our own, by which persons aecused of crime are permitted to testify in their own behalf, the latter seems to question the propriety of so great a change in the long established system of eriminal jurisprudence, resting his objeetions principally on the ground of merey to the defendants themselves. In referring to the views of Chief Justice Appleton, Judge Redfield, says :

"He believes that most men accused of crime are veritably guilty, and that they should be legally convicted and punished; and like a sensible man, he advocates the admission of defendants in criminal cases to testify in their own behalf, if they so elect, because he expects, that under the operation of such a law, the guilty will be more sure of conviction and punishment, and that the innocent, will be more sure of escape; a result which every good man ought to desire. And we believe he is entirely right in his estimate of such a statute, and especially in regard to the guilty. For, whether they accept the proffered privilege or not, the effect will be almost sure to quicken the tendency toward, and to increase the certainty of, their conviction. And it is in this view only that we should feel prepared to give our adhesion to the proposed change; and it has also been from our thorough conviction that it must and will have the effect to secure the conviction of many who would otherwise have escaped, that we have hesitated in regard to so radical a change. We have all along had doubt, whether this is not virtually compelling a guilty man to give evidence, upon his final trial, against himself. For although the act in terms leaves the matter to his own election; no one can be so simple and unsophisticated, as not to comprehend, that if the respondent has the right to give testimony in his own behalf, and declines to avail himself of the privilege, it cannot fail to have almost the same effect as if he had given testimony against himself. The effect of the act therefore is, practically, to require defendants to testify in criminal cases of every grade, which is so essential a departure from the spirit and principles of the English law, that we should hesitate about adopting it. It is tendering the accused an alternative which, if he is guilty, he can neither accept nor decline, without detriment, of a fatal character, to his cause."

The law, of which we speak, had a trial of one year in Connecticut, and was then repealed. Judge Redfield gives the reasons of the repeal in Connecticut, from a correspondent, as follows:

"The impression with the profession and judges was, that mercy to the accused demanded its repeal. . . . . . . Those usually denominated criminal lawyers were loudest in calling for a repeal of that act. If the accused testified, the jury were told that a man who would commit a crime would lie to get himself clear; and the jury would think so and disregard his testimony. On the other hand, if for any reason the accused did not avail himself of the privilege of testifying in his own favor, the jury were told he might have done so, and would, were he not conscious of guilt; and the jury would say so too."

We confess that we are in favor of the law. It is true that it has not yet been tried long enough in this State to enable the judiciary and the profession to determine with certainty whether it ought to remain permanently on the statute book, or not. We have heard no complaints

against it; and we believe that it meets with the approbation of the bench, the bar, and the community. Reasoning *a priorie*, it would seem that, in order to get at the truth, both sides should be heard, and both parties be allowed to give their own account of a transaction which is to undergo investigation; though we are aware that the conclusions drawn from *a priorie* reasoning are not always sustained, by actual experience in the practical affairs of life. It seems as if there was something inconsistent in permitting the prosecutor to give his version of the case, and in depriving the accused of the privilege of contradicting the testimony, or of explaining such circumstances as might throw an entirely different light on the transaction.

There is, no doubt, great force in the objections advanced by the *Register's* correspondent, as the reasons why the State of Connecticut repealed the law after the trial of only one year. The force of these reasons, however, would be, to a great extent, overcome, if judges in charging juries would take occasion to impress on their minds, that they ought not to draw unfavorable inferences from the neglect of the accused to offer himself as a witness. We happened, not long ago, to have been in the County Court of this county during the trial of a person for grand larceny. The counsel for the accused thought it injudicious to put his client on the stand, and the judge, Hon. Samuel Cowles, in addressing the jury, made something like the following remarks: "The Legislature," he said, "at its last session, saw fit to enact a new law, which introduces a great change in the administration of criminal justice—I allude to the act which admits parties accused of crime to offer themselves as witnesses in their own behalf. The law of course, is not compulsory, as it could not be under our Constitution. The defendant *may* give testimony, or not, as he pleases. As the act has not itself made it compulsory on the accused to give evidence in the cause, so neither have you the right to make his silence compulsory evidence against him, as you would, in effect, do, if you were to draw any inference, prejudicial to him, from the fact of his not having volunteered to testify. You are required not only by the law, but by the imperative demands of justice, to give your verdict according to the evidence submitted to you—not according to what you may imagine might have been given in evidence, had the defendant seen fit to testify. You have no right to draw any conclusions unfavorable to the prisoner, because his counsel has not put him on the stand. From my experience since the passage of the statute referred to, in trying many criminal cases of almost every grade of crime, I think I may say, as a general rule, that counsel do not deem it expedient to offer their client as a witness, however thoroughly they may be pursuaded of his innocence. They may think, that, however deserving of credit he may, in truth, be, his appearance or manner, his want of language, or embarrass-

ment are such as would be likely to leave an impression on the mind of the jury unfavorable even to truth itself. And such is in many instances more likely to be the case with an innocent person than with one who is guilty. Hardened guilt is more likely to appear to advantage in the witness box, than timid innocence. It is a mistake to suppose that an innocent man, when accused of crime, amongst strangers, and especially where the circumstances are apparently of a suspicious character, will feel entirely unembarrassed. However this may be, in my opinion, counsel are justified, as a general thing, in not producing the defendant as a witness; and it would be a violation of your duty and of your oaths, were you to permit this negative circumstance to have any weight in your deliberations upon, and discussions of, the testimony which has been submitted to you through the appropriate and legitimate channels of the law. You are not authorized to construe the silence of the defendant as testimony against himself. The law presumes him to be innocent, and you are not to find him guilty, unless he is *proved* to be guilty. Conjectures drawn from his silence are not sufficient."

It struck us at the time that these remarks of the learned judge were appropriate and well-timed. And we believe that, until juries shall have become somewhat accustomed to the administration of the criminal law under the operation of the novel enactments referred to, some such caution is necessary in order to give proper equilibrium to the scales of justice. For, it is impossible to shut our eyes to the palpable truth, that, in the absence of some such admonitory suggestions, a jury will be liable to give undue consideration and weight, to the silence of a party, who declines to avail himself of the privilege conceded to him by this law.

There is another reason why we are inclined to approve of the introduction of the new practice. It abrogates one of the several absurdities which yet remain of the "time-honored" traditions of the common law. It gives hope of still further improvement. We expect to live to see the day when the entire system of grand juries shall be abolished—when the present petit jury system shall be greatly modified—when a more suitable method shall be adopted of reforming convicted criminals, than merely shutting them up, with the almost absolute certainty, that the guilty, when discharged from their term of imprisonment, will, nay must, from the necessity of things, become more criminal and guilty still. These are all inveterate relics of the antiquated order of things which we have inherited from England together with the numerous benefits of the common law. We hope to be able to call the attention of the profession and the community to a more extended consideration of these topics at some future time. In the meanwhile, we conclude this notice with the simple remark, that the enactment of the new law of evidence is a step in the right direction. B.

We have received a California Law Publication, entitled Forms and Use of Blanks, compiled by R. W. Hent, Esq., of the San Francisco Bar, and published by H. H. Bancroft & Co., Law Publishers, San Francisco. Mr. Hent was engaged about two years in preparing the manuscript for the work, after which it was printed, and proof-sheets submited for review and correction to several leading attorneys of the San Francisco bar, and is now published as corrected and amended by them. We have examined the work, and feel justified in saying that it comes fairly up to the standard of the best Law and Form Books published in England or America; and for the use of the members of the bar, and business men, of California, and the other Pacific States, it is superior to them all; being compiled with special reference to the statutes and local laws and regulations of said States. It contains the usual forms, under the Law Merchant, for all kinds of agreements, and contracts; modified, to conform to the statutes of California, Oregon, and Nevada: together with full practice forms, for the Supreme, District, County, Probate and Justices Courts; and official, such as Sheriff's, Notary's and Clerk's Blanks; and also certain invaluable *special* forms, laws, and regulations, not generally found in like works; such as, Mining laws, regulations and forms; Custom House, and School Law Blanks; Statutes of the United States in relation to Seamen; and directions for the use and cancellation of United States Internal Revenue Stamps. We notice a new feature in all the forms, which we think is an improvement: the spaces, which ordinarily are left *blank*, and are often as difficult, for the unprofessional man to fill, as to draw the body of the instrument, in this work *are set in script type*; so that the *legal form* for wording the *special matter*, is obtained. Bancroft & Co. have stereotyped and published, *expressly for the work*, most of the forms therein contained, numbering the blanks the *same* as in the book, so that purchasers of the work can asertain just what blanks they need, and order them.

We can recommend the work as a careful, accurate and full compilation of forms, adapted to the laws of the Pacific States, and more particularly to the laws of California. With Attornies on this coast, it will undoubtedly supersede the use of all other Form Books. *Published in 2 vols. octavo, sheep*; price $15. O.

OBITUARY.

As we go to press, the sad news of the death of Gen. C. H. S. Williams, is announced. General Williams was one of the pioneers of California, and was recognized by his brethren of

the bar, as well as the community at large, as an honorable man, a thorough scholar and a profound lawyer ; he possessed that rare combination of intellectual faculties which enabled him to use convincing logic or inspiring eloquence ; so that as an advocate he could at will drive the reluctant judgment with fact and syllogism, or lead the passions, with the flowery chain of rhetoric. We recollect well the first time we ever heard the General at the Bar. It was a battle of the Giants. The warrior statesman, Gen. E. D. Baker, being on one side, and General Williams on the other. It was the celebrated Peralta Will Case : the trial lasted more than a week, and was most closely contested, and the final argument, was on both sides the most profound, logical and eloquent, we have ever heard ; a school boy at the time, it decided our choice as to a profession, and we have ever since revered the superior talents of our deceased brother ; and now as we announce his death, feel that there is a vacancy in our ranks that cannot be filled. He is dead ! but he lives in the untarnished record, as an honest and trustworthy counsellor, a careful, industrious practitioner, and an able and eloquent advocate, he has left for our example. O.

ILLEGAL FEES IN JUSTICES COURTS.

Considerable excitement has been created during the past month by the strictures of the *Bulletin*, concerning alleged illegal charges by Justices of the Peace. If the act of 1866, is to be construed according to the usual rules, it is evident that no Justice of the Peace is entitled to more than $5, for all services in any action in this City and County.

The question of reaching the matter is more difficult. A complaint has been presented to the 4th District Court, against a Justice of the Peace, specifying forty-eight cases. wherein he is charged with having collected illegal fees. The complaint was filed under the provisions of the act of 1853, giving special jurisdiction to District Courts, providing for a summary citation and a deprivation of office, with a judgment of

$500, in favor of the complainant. The Court deemed that the constitutional amendment of 1863 deprived it of jurisdiction, and denied the application. The matter was then taken to the County Court, where it remains undetermined.

The Statute provides for the punishment of Justices by indictment, and otherwise. It is desirable that the matter should be passed upon by a Court of Law, and that its judgment should determine the legal fees. Perhaps the case may be reached by tender of legal fees and by mandamus subsequently; still this would hardly prevent the abuses complained of. W.

LIST OF AMERICAN AND BRITISH JUDGES.

[From the American Law Review.]

At the suggestion of several gentlemen of the bar, we have formed and published below a complete list of United States Judges, and of the Judges and Law officers of Great Britain and Ireland, corrected to the present time.

For the list of the Judges of the United States District Courts, we are indebted to the courtesy of the Hon. J. H. Ashton, Assistant Attorney-General. We have been unable to procure the residences of all of these gentlemen, as the appointment of many of them, particularly of those in the Southern States, has been very recent. We trust these lists will be found useful, and hope, in succeeding numbers, to give similar lists of the Superior Courts of the several States and Territories, as well as of the British Provinces.

Supreme Court of the United States.

	Appointed.	Residence.
Salmon Portland Chase, of Ohio, *Chief Justice*	1864.	Washington.
James Moore Wayne, of Georgia, *Justice* . .	1835.	Washington.
Samuel Nelson, of New York, *Justice* . . .	1846.	Cooperstown, N.Y.
Robert Cooper Grier, of Pennsylvania, *Justice*	1846.	Philadelphia.
Nathan Clifford, of Maine, *Justice*	1858.	Portland, Me.
Noah H. Swayne, of Ohio, *Justice*	1862.	Columbus, Ohio.
Samuel F. Miller, of Iowa, *Justice*	1862.	Keokuk, Iowa.
David Davis, of Illinois, *Justice*	1862.	Bloomington, Ill.
Stephen Johnson Field, of California, *Justice* .	1863.	Sacramento, Cal.
Henry Stansbery, *Attorney-General*	1866.	Cincinnati.

Court of Claims.

Joseph Casey, of Pennsylvania . . . . *Chief Justice.*

Edward G. Loring, of Massachusetts
David Wilmot, of Pennsylvania
Ebenezer Peck, of Illinois
Charles C. Nott, of New York . . . . *Judges.*

Judges of the District Courts.

District.	
Maine	Edward Fox, of Portland.
New Hampshire	Daniel Clark, of Manchester.
Vermont	David A. Smalley, of Burlington.
Massachusetts	John Lowell, of Boston.
Rhode Island	Jonathan R. Bullock, of Newport.
Connecticut	William D. Shipman, of Hartford.
New York, Northern District	Nathan K. Hall, of Buffalo.
New York, Southern District	Samuel R. Betts, of New York.
New York, Eastern District	Charles L. Benedict, of Brooklyn.
New Jersey	Richard S. Field, of Princeton.
Pennsylvania, Eastern District	John Cadwalader, of Philadelphia.
Pennsylvania, Western District	Wlson M'Candless, of Pittsburg.
Delaware	Willard Hall, of Wilmington.
Maryland	William F. Giles, of Baltimore.
Virginia	John C. Underwood, of Norfolk.
West Virginia	John J. Jackson, of Parkersburgh.
North Carolina	George W. Brooks.
South Carolina	George S. Bryan.
Georgia	John Erskine.
Alabama	Richard Busteed, of Mobile.
Mississippi	Robert A. Hill.
Florida, Northern District	Philip Fraser, of Fernandina.
Florida, Southern District	Thomas J. Boynton, of Key West.
Louisiana, Eastern District	Edward H. Durnell, of New Orleans.
Louisiana, Western District	(Vacant.)
Texas, Eastern District	John C. Watrous, of Galveston.
Texas, Western District	Thomas H. Duval.
Arkansas	Henry. C. Caldwell.
Tennessee	Conally F. Trigg, of Nashville.
Kentucky	Bland Ballard, of Louisville.
Ohio, Northern District	Hiram V. Willson, of Cleveland.
Ohio, Southern District	Humphrey H. Leavitt, of Steubenville.
Michigan, Eastern District	Ross Wilkins, of Detroit.
Michigan, Western District	Soloman L. Withey, of Grand Rapids.
Indiana	David McDonald.
Illinois, Northern District	Thomas Drummond, of Chicago.
Illinois, Southern District	Samuel H. Treat, Jr., of Springfield.
Missouri, Eastern District	Samuel Treat, of St. Louis.
Missouri, Western District	Arnold Krekel.
Iowa	James M. Love, of Keokuk.
Wisconsin	Andrew G. Miller, of Milwaukie.
California	Ogden Hoffman, of San Francisco.
Oregon	Matthew P. Deady, of Winchester.
Kansas	Mark W. Delahay, of Leavenworth.
Nevada	Alexander W. Baldwin, of Carson City.
Minnesota	Rensselaer R. Nelson, of St. Paul.

Supreme Court of the District of Columbia.

David K. Carter	*Chief Justice.*
George P. Fisher Abraham B. Olin Andrew Wylie	*Justice.*

Great Britain and Ireland.

House of Lords.—Law Lords.

	Born.	Raised to the Peerage.
Frederick Thesiger, Lord Chelmsford, *Lord High Chancellor*	1794.	1858.
Henry Brougham, Lord Brougham & Vaux	1778.	1830.
Robert Monsey Rolfe, Lord Cranworth	1790.	1850.
Edward Burtenshaw Sugden, Lord St. Leonards	1781.	1852.
James Parke, Lord Wensleydale	1782.	1856.
Thomas Pemberton-Leigh, Lord Kingsdown	1793.	1858.
Richard Bethell, Lord Westbury	1800.	1861.
John Romilly, Lord Romilly, *Master of the Rolls*	1801.	1865.

England.

Courts of Chancery.

The Right Hon. Lord Chelmsford (B. 1794; app. 1866), *Lord High Chancellor.*

The Right Hon. Sir James Lewis Knight-Bruce (B. 1791; app. 1851); the Right Hon. Sir George James Turner (B. 1798; app. 1853), *Lords Justices of the Court of Appeal.*

The Right Hon. Lord Romilly (B. 1801; app. 1851), *Master of the Rolls.*

Sir Richard Torin Kindersley (B. 1792; app. 1851); Sir John Stuart (B. 1793; app. 1852); Sir William Page Wood (B. 1801; app. 1853), *Vice Chancellors.*

Court of Queen's Bench.

The Right Hon. Sir Alexander James Edmund Cockburn, Bart. (B. 1802; app. 1859), *Lord Chief Justice.*

Sir Colin Blackburn (B. 1813; app. 1859); Sir John Mellor (B. 1809; app. 1861); Sir William Shee (B. 1804; app. 1864); Sir Robert Lush (app. 1865), *Justices.*

Court of Common Pleas.

The Right Hon. Sir William Erle (B. 1793; app. 1859), *Lord Chief Justice.*

Sir James Shaw Willes (B. 1815; app. 1855); Sir John Barnard Byles (B.1801; app. 1858); Sir Henry Singer Keating (B. 1804; app. 1860); Sir Montague Edward Smith (B. 1809; app. 1865), *Justices.*

Court of Exchequer.

The Right Hon. Sir Fitzroy Kelly (B. 1796; app. 1866), *Lord Chief Baron.*

Sir Samuel Martin (B. 1801; app. 1850); Sir George William Willshere Bramwell (B. 1808; app. 1856); Sir William Fay Channell (B. 1804; app. 1857); Sir Gillery Pigott (B. 1813; app. 1863), *Barons.*

High Court of Admiralty.

The Right Hon. Stephen Lushington (B. 1787; app. 1839), *Judge.*

Courts of Probate, Divorce, and Matrimonial Causes.

The Right Hon. Sir James Plaisted Wilde (B. 1816; app. 1863), *Judge of Probate, and Judge Ordinary.*

Sir Hugh M'Calmont Cairns (B. 1819; app. 1866), *Attorney-General.*
Sir William Bovile (B. 1814; app. 1866), *Solicitor-General.*
Sir Robert Joseph Phillimore (B. 1809; app. 1862), *Queen's Advocate.*

Judicial Committee of the Privy Council.*

Lord Chelmsford, *Lord High Chancellor.*

The Duke of Buckingham and Chandos, *Lord President of the Council.*
The Marquess of Salisbury, the Earl of Lonsdale, Earl Granville, *former Presidents;* Lord Brougham; Lord Cranworth; Lord Saint Leonards; Lord Wensleydale; Lord Kingsdown; Lord Westbury; Lord Romilly, *Master of the Rolls;* the Right Hon. Stephen Lushington; Lord Justice Knight-Bruce; Sir James Wigram, formerly *Vice-Chancellor;* Sir Edward Ryan, formerly *Chief Justice of Bengal;* Sir Frederick Pollock, Bart., formerly *Lord Chief Baron;* Lord Justice Turner; Lord Chief Justice Cockburn; Sir John Taylor Coleridge, formerly *Judge of the Court of Queen's Bench;* Lord Chief Justice Erle; Sir James Plaisted Wilde; Sir Edward Vaughn Williams, formerly *Judge of the Court of Common Pleas;* Lord Chief Baron Kelly.
Assessors.—Sir James William Colville and Sir Lawrence Peel, formerly *Chief Justices of Bengal.*

Scotland.

Court of Sessions.

The Right Hon. Duncan McNeill (B. 1794; app. 1851), *Lord Justice General, and Lord President of the whole Court.*
The Right Hon. John Inglis (B. 1810; app. 1858), *Lord Justice Clerk.*

Inner House.—First Division.

The Lord Justice General, *President.*
John Marshall, Lord Curriehill (B. 1794; app. 1852); Sir George Deas, Lord Deas (B. 1804; app. 1853); James Crawford, Lord Ardmillan (B. 1805; app. 1855), *Lords.*

Inner House.—Second Division.

The Lord Justice Clerk, *President.*
John Cowan, Lord Cowan (B. 1798; app. 1851); Hercules Robertson, Lord Benholme (B. 1795; app. 1853); Charles Neaves, Lord Neaves (B. 1800; app. 1854), *Lords.*

* Each case is heard by only a part of the Committee,—generally three or four. The noblemen, not lawyers, are only nominal members. Lords Brougham and Saint Leonards, from age, and Sir James Wigram, from blindness, have ceased to take any very active part in the decision of cases.

Outer House.

William Penney, Lord KINLOCH (B. 1801; app. 1858); the Hon. Charles Baillie, Lord JERVISWOODE (B. 1804; app. 1859); Robert Macfarlane, Lord ORMIDALE (B. 1802; app. 1862); Edward Francis Maitland, Lord BARCAPLE (B. 1808; app. 1862); David Mure Lord MURE (B. 1811; app. 1865), *Lords Ordinary.*

COURT OF JUSTICIARY.

The Lord Justice General, the Lord Justice Clerk, Lord COWAN, Lord DEAS, Lord ARDMILLAN, Lord NEAVES, Lord JERVISWOODE, *Lords Commissioners.*

The Right Hon. GEORGE PATTON (App. 1866), *Lord Advocate.*
EDWARD STRATHERN GORDON, Esq. (App. 1866), *Solicitor-General.*

Ireland.

COURTS OF CHANCERY.

The Right Hon. FRANCIS BLACKBURNE (B. 1782; app. 1866), *Lord High Chancellor.*

The Right Hon. ABRAHAM BREWSTER (B. 1796; app. 1866), *Lord Justice of the Court of Appeal.*

Vacant,— *Master of the Rolls.*

COURT OF QUEEN'S BENCH.

The Right Hon. JAMES WHITESIDE (B. 1804; app. 1866), *Lord Chief Justice.*

JAMES O'BRIEN, Esq. (B. 1806; app. 1858); EDMUND HAYES, Esq. (B. 1804; app. 1859); the Right Hon. JOHN DAVID FITZGERALD (B. 1815; app. 1860), *Justices.*

COURT OF COMMON PLEAS.

The Right Hon. JAMES HENRY MONAHAN (B. 1804; app. 1850), *Lord Chief Justice.*

The Right Hon. WILLIAM KEOGH (B. 1817; app. 1856); JONATHAN CHRISTIAN, Esq. (B. 1810; app. 1858); the Right Hon. THOMAS O'HAGAN (B. 1810; app. 1865), *Justices.*

COURT OF EXCHEQUER.

The Right Hon. DAVID RICHARD PIGOTT (B. 1800; app. 1846), *Lord Chief Baron.*

FRANCIS A. FITZGERALD, Esq. (B. 1807; app. 1858); HENRY G. HUGHES, Esq. (B. 1813; app. 1859); the Right Hon RICKARD DEASY (B. 1810; app. 1861), *Barons.*

THOMAS F. KELLY, Esq. (B. 1803; app. 1855), *Judge of the Court of Admiralty.*

The Right Hon. RICHARD KEATINGE (B. 1793; app. 1843), *Judge of Probate.*

The Right Hon. JOHN EDWARD WALSH (App. 1866), *Attorney-General.*
MICHAEL MORRIS, Esq. (B. 1827; app. 1866), *Solicitor-General.*

CALIFORNIA COURT AND OFFICIAL DIRECTORY.

UNITED STATES COURTS AND OFFICIALS.

COURTS.	LOCATION.	TERMS.	JUSTICES, ETC.	CLERKS.	MARSHAL.
U. S. Circuit Court,....	San Francisco, ...	1st Monday Feb., 2d Mond. June, & 1st Mond. Oct.	Stephen J. Field, Assoc. Justice U.S. Sup. Court, presid'g Judge	George C. Gorham. Dan'l T. Sullivan, and Sam'l Neal, Deput's,	Geo. F. Worth, Chief Deputy. C. W. Rand.
U. S. District Court,...	San Francisco, ...	1st Monday Ap'l, 2d Mond. Aug., & 1st Mond. Dec.	Ogden Hoffman,..............	George C. Gorham,.....	C. W. Rand.
U. S. Commissioners,..	San Francisco, ...	....	George C. Gorham & Daniel T. Sullivan, Commissioners, ...	....	C. W. Rand.
U. S Land Register's & Receiver's Office, *San Francisco Dist.*	San Francisco, s. w. cor. Montg'y & Jackson Sts.	....	James W. Shanklin, Register, Chas. H. Chamberlain, Rec'er,	J. M. Wood, Ch. Clerk & T. A. Hyde, Ass't	....
U. S. Land Register's & Receiver's Office, *Marysville District,*	Marysville,........	....	L. B. Ayer, Register,.......... C. C. Bockius, Receiver, ...	Samuel Semper, Chief Clerk.	....
U. S. Land Register's & Receiver's Office, *Stockton District,..*	Stockton,.........	....	S. T. Nye, Register, ... Geo. C. Haven, Receiver, ...	....	....
U. S. Land Register's & Receiver's Office, *Humboldt District,*	Eureka, ...	....	John Keleher, Register, ... W. H. Pratt, Receiver,........	....	....
U. S. Land Register's & Receiver's Office, *Visalia District, ...*	Visalia,...........	....	H. W. Briggs, Register, ... Tipton Lindsey, Receiver,....	....	....

U. S. District Attorney, Delos Lake, San Francisco.] U. S. SURV. GENERAL'S OFFICE, San Francisco. Lauren Upson, *Surv. General;* Charles E. Glidden, *Ch. Clerk;* Rufus C. Hopkins, *Keeper of Archives;* James H. Wildes, *Princ'l Draughtsman;* Robinson Gibbons, *Draughtsman;* Cassimer Bielawski, *Draughtsman;* R. J. Conway, *Field Note Clerk;* John A. Brewster, *Field Note Clerk.*

STATE COURTS AND OFFICIALS.—SUPREME COURT.

CAPITAL.	JUSTICES.	TERMS.	CLERK.	ATT'Y GEN'L.	REPORTER.
Sacramento.	John Currey, Chief Justice, Lorenzo Sawyer, A. L. Rhodes, S. W. Sanderson and O. L. Shafter, Justices.	1st Monday in January, April, July and October.	W. D. Harriman.	J. G. McCullough.	Chas. A. Tuttle.

District, County and Probate Courts.

District	Districts and Counties	County Seats	Clerks	County and Probate Judges	District Judges
1st	Los Angeles	Los Angeles	T. D. Mott	W. G. Dryden	Pablo de la Guerra.
	San Bernardino	San Bernardino	A. F. Kenney	A. D. Boren	
	San Diego	San Diego	Geo. A. Pendleton	Julio Ossuno	
	San Luis Obispo	San Luis Obispo	Chas. W. Dana	W. L. Beebee	
	Santa Barbara	Santa Barbara	F. A. Thompson	F. G. Maguire	
2d	Butte	Oroville	J. G. Moore	W. S. Safford	W. T. Sexton.
	Lassen	....	A. A. Smith	W. R. Harrison	
	Plumas	Quincy	J. B. Overton	E. T. Hogan	
	Tehama	Red Bluff	F. J. French	Warren Earll	
3d	Alameda	San Leandro	Isaac A. Amerman	N. Hamilton	S. B. McKee.
	Monterey	Monterey	W. M. R. Parker	W. H. Rumsey	
	Santa Clara	San Jose	A. E. Pomeroy	Isaac N. Senter	
	Santa Cruz	Santa Cruz	T. T. Tidball	A. W. Blair	
4th	San Francisco	San Francisco	William Loewy	Samuel Cowles, County, and M. C. Blake, Probate Judge	E. D. Sawyer.
5th	San Joaquin	Stockton	H. T. Dorrance	H. B. Underhill	Joseph M. Cavis.
	Tuolumne	Sonora	P. M. Fisher	G. B. Keyes	
6th	Sacramento	Sacramento	E. D. Shirland	Robert C. Clark	J. H. McKuen.
	Yolo	Woodland	E. Giddings	James A. Hutton	
7th	Lake	Lakeport	S. Bynum	J. B. Holloway	J. B. Southard.
	Marin	San Rafael	D. T. Taylor	George Steele	
	Mendocino	Ukiah	James Anderson	William Holden	
	Napa	Napa City	C. B. Seeley	Robert Crouch	
	Solano	Suisun City	W. I. Costigan	Thomas M. Swan	
	Sonoma	Santa Rosa	W. L. Anderson	C. W. Langdon	
8th	Del Norte	Crescent City	P. M. Peseler	E. Mason	William R. Turner.
	Humboldt	Eureka	James M. Short	J. E. Wyman	
	Klamath	Orleans Bar	B. W. Jencks	J. T. Carey	

CALIFORNIA COURT AND OFFICIAL DIRECTORY.

District, County and Probate Courts—Concluded.

Districts	Counties	County Seats	Clerks	County and Probate Judges	District Judges
9th	Shasta	Shasta	Charles McDonald	C. C. Bush	E. Garter.
	Siskiyou	Yreka	R. S. Green	A. M. Rosborough	
	Trinity	Weaverville	A. J. Loomis	John Murphy	
10th	Colusa	Colusa	Jackson Hart	Joseph G. Treadway	J. S. Belcher.
	Sierra	Downieville	W. F. Thomas	S. B. Davidson	
	Sutter	Yuba City	Caleb E. Wilcoxson	B. G. Hulbert	
	Yuba	Marysville	D. E. Arnold	J. O. Goodwin	
11th	Amador	Jackson	J. C. Shipman	J. Foot Turner	S. W. Brockway.
	Calaveras	Mokelumne Hill	J. A. Foster	James Barclay	
	El Dorado	Placerville	D. W. Standeford	Ogden Squires	
12th	San Francisco	San Francisco	William Loewy	Samuel Cowles, County Judge	O. C. Pratt.
	San Mateo	Redwood City	T. H. Noble	H. Templeton	
13th	Fresno	Millerton	William Faymonville	E. C. Winchell	Alexander Deering.
	Mariposa	Mariposa	A. Reynolds	L. F. Jones	
	Merced	Snelling	C. M. Blair	J. W. Robinson	
	Stanislaus	Knight's Ferry	A. Huvet	A. Elkins	
	Tulare	Visalia	T. J. Shackleford	Nathan Baker	
14th	Nevada	Nevada	R. H. Farquhar	A. C. Niles	T. B. McFarland.
	Placer	Auburn	W. D. Spear	H. Fellows	
15th	San Francisco	San Francisco	William Loewy	Samuel Cowles, County Judge	S. H. Dwinelle.
	Contra Costa	Martinez	George P. Loucks	Mark Shepard	
16th	Alpine	Silver Mountain	J. N. Barber	Henry Eno	Therin Reed.
	Inyo	Independence	T. Passmore	O. L. Mathews	
	Kern	Havilah	H. D. Bequette	L. F. Heumiston	
	Mono	Bridgeport	J. N. Duddleston	J. C. Robinson	

Terms of District, County and Probate Courts.

COUNTY.	DIS.	DISTRICT COURTS.		COUNTY COURTS.		PROBATE COURTS.
Alameda	3	3d Monday	February, June and October	1st Monday	Jan, Apr, July & 3d Mond. Sept	Same as County Court.
Alpine	16	1st "	March and September	1st "	February, June and October	Same as County Court.
Amador	11	2d "	March, June, Sept, and Dec	1st "	February, May, Aug and Nov	Same as County Court.
Butte	2	2d "	March & Dec, 4th Monday July	1st "	Jan, Mar, May, July, Sept & Nov	Same as County Court.
Calaveras	11	2d "	January, April, July & October	1st "	March, June, Sept and Dec	Same as County Court.
Colusa	10	1st "	January, May and September	1st "	March, June, Sept and Dec	1st Monday Mar, June, Sept and Dec.
Contra Costa	15	3d Tuesday	April, July and November	3d "	January, April, July and Oct	1st Monday of each month.
				1st "	April, Aug & Nov.—Special Terms at option of Judge.	Same as County Court.
Del Norte	8	2d Monday	May, August and November	1st "	April, July and October	Same as County Court.
El Dorado	11	2d "	Feb & May, 3d Mon. Aug & Nov	2d "	March, June, Sept and Dec	2d Monday Jan, Apr, July and Oct.
Fresno	13	3d "	February, June and October	1st "	Jan, Mar, May, July, Sept & Nov	Same as County Court.
Humboldt	8	2d "	March, June, Sept and Dec	1st "	Jan, Mar, May, July, Sept & Nov	Same as County Court.
Inyo	16	4th "	May and November			
Kern	16	1st "	June and December			
Klamath	8	2d "	April, July and October	1st "	April, July and October	Same as County Court.
Lake	7	3d "	April and 2d Monday November	1st "	January, April, July and Oct	Same as County Court. County Court takes precedence.
Lassen	2	1st "	June and 2d Monday October	1st "	February, May, Aug and Nov	Same as County Court. Special Terms at option of Judge.
Los Angeles	1	1st "	February, May and November	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Marin	7	1st "	March, July and 3d Monday Nov	3d "	March, June, Sept and Dec	Same as County Court.
Mariposa	13	4th "	March, July and November	1st "	Jan, Mar, May, July, Sept & Nov	Same as County Court.
Mendocino	7	2d "	Ap, 3d Mon. July & 1st Mon. Nov. Length of Term discretionary with Judge	1st "	March, June, Sep and Dec	1st Monday Mar, June, Sep and Dec.
Merced	13	4th Monday	January, May and September	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Mono	16	1st "	April and October	1st "	January, May and September	1st Mond. Jan, Mar, May, July & Sep.
Monterey	3	1st "	April and October	1st "	Apr, 2d Mond. Aug and Dec	Same as County Court.
Napa	7	1st "	February, June and October	1st "	Mar, 3d Mo. Je, 1st Mo. Sep & De	Same as County Court.
Nevada	14	2d "	March, June, Sept and Dec	1st "	February, May, August and Nov	1st Monday of each month.

CALIFORNIA COURT AND OFFICIAL DIRECTORY.

Terms of District, County and Probate Courts—Concluded.

COUNTY.	DIS.	DISTRICT COURTS.		COUNTY COURTS.		PROBATE COURTS.
Placer	14	1st Monday	Feb, May, August and Nov	1st Monday	March, June, Sept and Dec	Same as County Court.
Plumas	2	2d "	May and 4th Monday Sept	1st "	Jan, Mar, May, July, Sep & …	Same as County Court.
Sacramento	6	1st "	Feb, Apr, June, Aug, Oct & Dec	1st "	January, April, July and OctNov	1st Monday Jan, Apr, July and Oct.
San Bernardino	1	1st "	April and September	1st "	Jan, Mar, May, July, Sep & Nov	4th Monday of each month.
San Diego	1	1st "	October and 3d Monday April	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
San Francisco	4	1st "	Feb, May, Aug and November			
	12	1st "	January, April, July and Oct	1st "	Jan, Mar, May, July, Sep & Nov	1st Monday of each month.
	15	1st "	March, June, Sept and Dec			
San Joaquin	5	1st "	April, August and December	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
San Luis Obispo	1	1st "	March and August	1st "	March, June, September & Dec	Same as County Court.
San Mateo	12	3d "	Mar, 4th Mon. June, Sept & Dec	1st "	Feb, June, and last Mond. Sep	1st Mon. Feb, June & last Mon. Sept.
Santa Barbara	1	3d "	June and December	1st "	March, June, Sept and Dec	Same as County Court.
Santa Clara	3	2d "	January, May and September	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Santa Cruz	3	2d "	April, August and December	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Shasta	9	2d "	March, June and November	1st "	January, May and September	1st Mond. Feb, Ap, Je, Aug, Oct, Dec.
Sierra	10	1st "	Ap, 2d Mond. July, 4th Mond. Oc	3d "	Apr, June & Sep, 2d Mond. Dec	
Siskiyou	9	3d "	January, May and September	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Solano	7	3d "	January, May and September	1st "	April, August and December	Same as County Court.
Sonoma	7	3d "	February, June and October	1st "	January, April, July and October	1st Monday of each month.
Stanislaus	13	1st "	February, June and October	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Sutter	10	4th "	Feb, June and 3d Monday Oct	1st "	January, April, July and Oct	Same as County Court.
Tèhama	2	2d "	Feb and Nov, 4th Monday June	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Trinity	9	2d "	April, August and December	1st "	Mar, May, July, Sept and Nov	Same as County Court.
Tulare	13	4th "	February, June and October	1st "	Jan, Mar, May, July, Sep & Nov	Same as County Court.
Tuolumne	5	1st "	March, July and November	1st "	January, May and September	Same as County Court.
Yolo	6	3d "	March, July and November	1st "	Mar, May, July, Sept and Nov	Same as County Court.
Yuba	10	3d "	January, May and September	1st "	Jan, Apr and July, 2d Mon. Oct	Same as County Court.

Note.—We have found it difficult to obtain authentic information, in all cases, in the preparation of the foregoing Directory; and shall feel obliged to Clerks and other Officials, for corrections and additions, if it be necessary, for our future numbers.—Eds.

OF LEARNED JURISTS.

"COMMON LAW, like our language, is of a various and motley origin, as various as the nations that have peopled England, in different parts, and at different periods."

1st *Reeves' History*, pp, 1 & 2.

"COMMON AND CIVIL LAW, more often like a globe and a plane, that touch in only one point, than like two planes which have an entire coincidence."

Eunomus, 38.

"CIRCUMSTANTIAL EVIDENCE. The human mind applied to it, is like the disturbing power of an uneven mirror, imparting its own nature upon the true nature of things."

Lord Bacon, quoted in *Wills on Circumst. Ev.*, p. 32.

"LAW is a polemical art, that can be no more learned alone, than *fencing* or *cudgel playing*."

Eunomus, Intro., p. 28.

JUDGES. "An ignorant man *can not*, a coward *dare not*, be a good Judge."

2 *Campb.*, *Lives of Chs.*, p. 295.

"GOVERNMENT, may be considered as a great ballet, or dance, in which, as in other ballets, every thing depends on the disposition of the figures."

1 *Stephens*, XXIV, *note*.

9

[Pacific Law Magazine, January, 1867.]

DECISIONS

OF THE

SUPREME COURT

OF

CALIFORNIA.

GOLLER AND HOFFMAN *v.* FETT, LARRIBEE AND DAVIS.—No. 1,011.

Ejectment, to recover the possession of certain mining ground, Plaintiffs claiming to be the owners of seven-twelfths thereof. Both parties claim under one Benfeldt—the Defendant, Fett, by a written conveyance, in due form, executed January 3d, 1866, including the whole of the property; the Plaintiffs, by verbal sales and transfers of possession previously made; the sale to Goller, being of four-twelfths, made in April, 1865; that to Hoffman, being of three-twelfths, made in August, of the same year. Judgment for Plaintiffs in Court below; *Held,*

1st, Assuming the sales and transfers by Benfeldt to Plaintiffs respectively, they became thereby tenants in common of the mine, and could sue jointly.

2d, The provision of the Act of 1860, that "conveyances of mining claims may be evidenced by bill of sale or instruments in writing not under seal," is mandatory and excludes conveyances by parol, even though accompanied by a delivery of possession.

3d, Plaintiffs might recover, if Defendants took with a notice of their equitable rights.

4th, Defendants were entitled to prove the expense of digging the gold-bearing earth.

Per curiam, SHAFTER, J.

The plaintiffs sue to recover the possession of certain mining ground, of which they claim to be the owners to the extent of seven-twelfths. The allegations of the complaint are denied in the answer, and the defendants plead specially, title in defendant Fett and a misjoinder of parties plaintiff. The plaintiffs recovered a verdict at the trial, on which judgment was duly entered for seven-twelfths of the premises undivided. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

Both parties claim under Benfeldt—the defendant Fett by a written conveyance, in due form, executed January 3, 1866, and including the whole of the property; the plaintiffs by verbal sales and transfers of possession previously made—the sale to Goller being of four-twelfths, made in April, 1865; that to Hoffman being of three-twelfths, made in August of the same year.

First—Assuming the sales and transfers by Benfeldt to the plaintiffs respectively, they became thereby tenants in common of the mine, and as such were authorized to sue jointly under the Act of 1857. (Acts 1857, p. 62; Touchard *v.* Keyes, 21 Cal., 208.)

Second.—The legal title to the seven-twelfths claimed by the plaintiffs did not pass to them by the verbal sales and transfers of 1865. The point arises under the Act of 1860 (Acts 1860, p. 175). It was considered *arguendo* in Patterson *v.* Keystone Mining Company (July Term, 1866), that the provision that "conveyances of mining claims may be evidenced by bills of sale or instruments in writing not under seal," contained in the first section of the Act, was mandatory, and that it was intended that that method of conveying mining claims should exclude conveyances by parol, even though accompanied by a delivery of possession. The point, however, was not directly adjudged in the case referred to, but it is now determined in conformity with the views therein expressed. The Court below, in opposition to this view of the effect of the Act of 1860, instructed the jury that if they found a verbal sale by Benfeldt to the plaintiffs respectively, accompanied by delivery of possession, that such verbal sales "would be as valid and effective to convey title as written bills of sale." This instruction was erroneous, and from anything we can know to the contrary the jury may have based their verdict upon it, without reference to other instructions, presenting to the jury an alternative ground, on which, if found, the plaintiffs would be entitled to recover. We cannot, therefore, intend that the jury ever put their minds upon the question as to whether Fett bought in 1866, with notice of the equitable right of the plaintiffs which their entry and possession had perfected.

Third—The Court erred, also, in refusing to permit defend-

ants to prove the expense of digging the gold-bearing earth. The point was directly adjudged in May *v.* Gappen (23 Cal., 306).

Judgment reversed and new trial ordered.

We concur: CURREY, C. J.
RHODES, J.

I concur in the judgment on the last ground discussed in the opinion of Mr. Justice Shafter, but I am compelled to dissent from the views expressed under the second point discussed. The construction adopted would, upon the same principles, render a conveyance of a mining claim under seal void, as well as a parol sale accompanied by a transfer of the possession to the vendee. I can gather from the language of the Act no intention on the part of the Legislature to abrogate any mode of conveyance before established. It seems to me that the only object of this particular provision was to remove a doubt before entertained by many as to whether a written conveyance of a mining claim required a seal to render it valid. I cannot think it was contemplated that a conveyance of a mining claim should be restricted to the form of conveyance permitted by the Act.

SAWYER, J.

NOTE.—The decision of the Court in this case seems to be ambiguous.

1st, It is held that the provision of the statute of 1860, declaring, that "conveyances of mining claims may be *evidenced* by bills of sale or instruments in writing not under seal," was intended to exclude conveyances by *parol*. Now, by all the rules known to us, a parol conveyance would be a conveyance *not under seal*, whether it be verbal or written; it cannot be intended that the statute is a nullity.

2d, It is held, that if Defendants bought with notice of Plaintiffs' perfected equitable right, through entry and possession, they were entitled to recover.

How could a sale, which in itself was null by the statute, support an equity? But, assuming that it was intended to be decided that a verbal sale of mining property accompanied with a delivery of possession, (though a full consideration be paid), cannot be sustained at law, under the statute of 1860; we submit that the argument of the Court, in support of this proposition, is not conclusive. It is contended, and so decided, that the statute of 1860, "is mandatory, and that it was intended that that method of conveying mining claims, (viz., by bill of sale or *instrument in writing* NOT UNDER SEAL,) should *exclude* conveyances by *parol*, &c.," and to sustain this construction, the case of Patterson *v.* the Keystone Mining Company is cited. The learned judge, who delivered the opinion in the case cited, undoubtedly expresses a *qualified* opinion in support of this construction; but he is careful to show, that "*the determination of the question, was not necessarily involved in the case,*" and to "*reserve*" it as we

may fairly infer, for a more careful and critical examination, than is usually made upon an *unnecessary* side issue growing out of a case under investigation. It is admitted, in Patterson *v.* the Keystone Mining Company, as "settled law," prior to the passage of the Act of 1860; that title to a mining claim would pass by a verbal sale, if accompanied by an actual transfer of the possession, the vendor being in actual possession at the time of the sale;—this was a rule of the common law of California in relation to mining property, (if we may so say,) derived both from custom and the decisions of the courts; a rule, fully justified, both on account of necessity, growing out of the migratory character of miners, and the frequent and informal transfers of their claims; and on account of the equivocal character of the estate in mining property, being treated for some purposes as *realty*, and for others as *personalty*. The custom of passing the title to mining claims by instruments in writing not under seal, as well as by verbal sale, was also settled and admitted to be law prior to the passage of the Act of 1860.

If the Act of 1860 take the construction given to it by the Court, it will *abrogate* this custom, or recognized common law, concerning verbal conveyances of mining property, and, it would seem, be subject to the rule of strict construction. 1 Kent, Com., 434, Gibson *v.* Jenney, 15 Mass., 205; Lock *v.* Miller 3 Stew. & Port., 13; People *v.* Buster, 11 Cal., 221, 2 Inst. 301, 1st Bouv. Inst. 41. If the custom be not considered "common law," within the meaning of the rule according to the authorities cited, still was it *law* of some kind, and if subjected to the principles of *statutory construction*, the rule applying is in the language of Chief Justice Murray, "where there are two laws upon the same subject, they must be so construed as to maintain both—if it can be done—without destroying the evident intent and meaning of the latter act." (Merrill *v.* Gorham, 6 Cal., 42); and the same result, so far as this case is concerned, as will appear more fully hereafter, is reached. For, by a strict construction, the word "may" in the sentence, "may be evidenced," &c., will follow the general rule, that "the words of a statute must be interpeted according to their common acceptation." Quigley *v.* Gorham 5 Cal. 418; Harris *v.* Reynoles 13 do. 518; Merchants' Bank *v.* Cook, 4 Pick., 405; Dwar. on Stat. 583, and will only *affirm* the *pre-existing custom*, as to the transfer of mining claims, by instruments not under seal; without abrogating or interfering with the further settled custom and law of verbal sales, accompanied by a delivery of possession; and if the statutory construction be admissible, the latter, and the former law, on the same subject, can only be made to harmonize, so that both shall stand; by adopting the same construction, and giving to the statute of 1860 the same *affirmative* or *explanative* meaning. Nor will any violence be done to the manifest intent of the Legislature by giving the Act the construction for which we contend. Let us examine it, by the light of the standard rules of statutory construction.

Vatell has said, "That must be the truest exposition of a law which best harmonizes with its *design*, its *objects*, and its *general structure*." Vat. B. 2 ch. 17, §285.

1st, What was the *design* of the Legislature?

A custom, judicially sanctioned as law, on the same subject, being in existence, at the time of the passage of the Act, the *design*, must have been either, 1st, to affirm; 2d, explain; 3d, remedy defects in; or, 4th, to abrogate; in whole or part, the existing law.

The presumption, *in limine*, is, that the Legislature *did not intend to alter*

(much less *abrogate*) the existing law. 1st Kent Com. 434; 1 Sand. 240; Dwr. on Stat. 564–5; and, unless by the clear letter of the law the intent to alter or abrogate appears; this presumption becomes conclusive. Such clear intent, usually appears by *negative* terms, or by affirmative provisions, exhaustive of the whole subject matter. And it will appear, by examining the Act, that the pre-existing law is not in terms *negatived* or *denied*, and that the statute does not pretend to furnish a general and exclusive rule on the subject of mining conveyances; for it is specially provided, "that nothing in this Act shall be construed to *interfere with or repeal any lawful local rules, regulations*, or CUSTOMS, *of the mines, in the several mining districts of this State.*" The clause last quoted not only bears with negative weight in the argument, but in our opinion, throws affirmative light on the subject in this, that it is a *legislative declaration of their own intent*, nay more, a *positive injunction*, against the construction of the Act adopted by the Court. For there are but two other modes of conveyances than those mentioned in the first clause of the Act, viz., conveyances under seal, and verbal conveyances; and if these modes are not included in the lawful local *rules, regulations* and *customs* mentioned, we are at a loss to know to what the exception refers.

The BARONS OF THE EXCHEQUER, in *Heydon's* case, laid down, as a rule for "the sure and true interpretation of all statutes," that four things are to be discerned, and considered.

1st, "What was the common law, before the making of the act?"

2d, "What was the mischief, and defect, against which the common law did not provide?"

3d, "What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?"

"4th, The true reason of the remedy."

Applying this rule to the present case, the first question has been sufficiently answered. The answers to the 2d and 3d interrogations, if they can be sought out, will elucidate the *design* of the Legislature in passing the Act, as well as throw light upon the objects to be attained by it.

Upon the authority of the dissenting Justice, Mr. Sawyer, a doubt was entertained by many, prior to the passage of the Act, whether a written conveyance of a mining claim required a *seal* to render it *valid*. To remove that doubt, by statutory *affirmation* of the *custom* then in force, would remedy this "mischief." Now by probing the statute for other defects, or mischiefs, to be cured, we think we discover, that it was intended to remedy, 1st, the evil of executing written conveyances without attesting witnesses; 2d, the evil of transferring such property, by written instruments of the character mentioned in the act, without an immediate delivery, and continued change of the possession thereof: and we can readily imgine, that loose practices in the mode of transferring mining property, requiring such legislative restrictions, were prevalent at the time of the passage of the act. Thus the *design* of the enactment, to us, seems to be two-fold—AFFIRMATIVE and REMEDIAL; and this design to be best harmonized, with what is presumed to have been the object of the statute, viz., the protection of property in mines; not by *abrogating* all lawful customs, and regulations concerning mining conveyances, and establishing an *exclusive statutory mode*, but, by declaring that to be law concerning which there was doubt, and by pruning away such mischief and defects as had grown up with the custom affirmed, "*ut res magis valeat quam pereat.*"

But it is said, in Patterson *v.* the Keystone Mining Co., that in the 1st sec-

tion of the act concerning conveyances, the word "*may*" means, "*must*" or "*shall;*" and it is asked, "Why does it not mean the same in the act under consideration?" We think it does not; for the reasons, in addition to what has already been said.

1st, That the conditions upon which "*may*," shall be interpreted, to mean "*shall*," or "*must*," according to the rule, do not exist. The rule is, "where a statute directs the doing of a thing for the *sake of justice*, or which is for the *public benefit*, the word '*may*,' shall be construed to mean '*shall*.'" No question of "*justice*" can arise in this case; and it is because, in our minds, such a construction is so manifestly *against the public benefit*, that we have been induced to write this article. Mining property is not ordinarily of a permanent character; and that legislation, or that judicial construction, which attempts to treat it as such, is, in the nature of things, unwise. What better notice can third parties want, or have, of the transfer of title, and change of possession, than to find an *occupant actually at work on his claim?* Will a miner "hunting a claim,"—a class of men proverbial for *honest carelessness* look—among musty records for *better evidences* of ownership? The statute would become a snare to his feet, instead of a security. Who shall suffer, if the owner of a claim shall "sell out," turn over the possession of his ledge, or his shaft, put his money in his pocket, and "travel for new diggings?" Not the miner, for it is his own custom, adopted as a necessity to his condition. And if the capitalist desire the solemn formulas of the conveyancing act, to make *his investment safe*, he can have them.

The 2d reason why we think the word "*may*" in the act in question, should not take the same construction as in the general act concerning conveyances, is, because the purposes of the two acts are radically different. The manifest intent of the general act concerning conveyances of real estate, is to *exclusively regulate* the whole subject matter, both as to the mode of *transferring title*, and the *manner* of *evidencing* such transfers. The intent of the Legislature to use a *permissive* word, in an *obligatory* sense, in this statute, has never been doubted; but the statute of 1860, is, by its terms, taken in the strongest sense, intended to regulate the mode of *evidencing* conveyances of mining claims only; and is, as we think we have shown, not *exclusive* of the entire subject matter of mining conveyances. The word "*evidenced*," as used in this statute, to say the very least, *can* be taken in a different sense than the word "*made*;" and is it not significant, that the Legislature did not use the latter and stronger term, if they had intended the statute to be "*mandatory*" and "*exclusive?*"

But another rule may be invoked, in the construction of this statute, viz., that "a statute should not be so construed as to lead to absurdity." Dwarris Tr. on Stat. 587, Henry *v.* Tilson, 17 Vt. 479. Upon this point in the language of Justice Sawyer, in his dissenting opinion, "The construction adopted, (by the Court) would, upon the same principles, render a conveyance of a mining claim *under seal* void; as well as a parol sale, accompanied by a transfer of the possession, to the vendee." It requires no argument to show that such a construction would not only lead to *absurdity*, but be productive of great *mischief*.

We have taken the liberty to make this hasty and imperfect review of the decision of the Court in this case, because, as has already been intimated, we think the statute, as construed by the Court, will be productive of no good, but on the contrary of much evil; and that the attention of the members of the bar, particularly in the mining districts, may be called to the subject, to the end that if the decision of the Court be adhered to as right, that the evil may be remedied by the Legislature.

O.

BODLEY *v.* FURGUSON, ET AL.—No. 676.

A verbal contract on the part of a married woman to convey her separate estate, assented to by her husband, full purchase money being paid, possession taken by the purchasers under the contract, and valuable improvements by them made on the property, may be set up as good equitable defense to an action of ejectment founded on a legal title obtained with notice of such facts.

The act of April 17th, 1850, defining the rights of husband, applies only to the separate property of women married subsequent to the passage of the act, and to property acquired after the passage of the act by women married before its passage in this State, or married out of the State and residing and acquiring property in it thereafter: The authority of *Ingoldsby* v. *Juan*, 12 Cal., 564, sustained.

Under the civil law a married woman was competent to contract to convey her separate property, and to convey it with the bare assent of her husband, this power was preserved under the treaty, and no statute or constitutional provision can unreasonably interfere with, or deprive her of the right to exercise it. Hence the act of April 16th, 1850, concerning conveyances can not be invoked.

The act of April 16th, 1850, prescribes a method by which married women can convey their separate property, but it points out none in which their *contracts* to convey must be made or evidenced. The only statute bearing upon the process by which a woman—married and acquiring separate property anterior to the cession—can bind herself to contract to convey, is the statute of frauds, and part performance of a contract to convey is excepted from the operation of this statute.

The act of April 13th, 1859, adopting the common law, did not take away the capacity of the plaintiff to contract, and her capacity being given, the tests applicable to her contracts, are those applicable by the common law to contracts at large.

The rule that a fee simple passes only by deed running to the grantee and his heirs does not apply to a contract to convey. Query whether the rule is "on foot" in this State, as to direct conveyances.

In all cases of contract, the intention of parties is to be determined by the language taken in its ordinary sense, unembarrassed by any mere technical rules.

Per curiam, SHAFTER, J.

This action is brought to recover the possession of 932½ acres of land, situate in the county of Santa Clara, and parcel of a grant of one league made by the Mexican Government to Clara Maria Ortega Gilroy, in the year 1838, she being then and since the wife of John Gilroy. Both parties claim under Mrs. Gilroy—the plaintiff, through a deed executed by her and her husband to Miguel Gilroy, on the 18th of November, 1858, and the defendants through an alleged equitable title, older than the admitted legal title of the plaintiff.

The facts found by the Court, in so far as they bear on the defendants' equity, are as follows: "On or about the 24th day of June, 1852, said Clara Maria Ortega Gilroy, with the consent and co-operation of her said husband, bargained and sold for full and valuable consideration to her then and there paid in the gold coin of the United States, to J. B. Allen and F. A. Smith the premises described in the complaint * * * and at the same time full and complete possession thereof was duly delivered to them by said Gilroy and wife * * * and from that time to the commencement of this action the said Allen and Smith, and the defendants Ferguson and Fellow, who have succeeded to all the rights which Allen and Smith acquired by said purchase, have had the full, quiet and peaceable possession thereof as owners, and their title thereto has been at all times freely acknowledged and confirmed by the said Gilroy and wife. * * * That Allen and Smith put improvements upon the land of the value of $10,000 and upwards, and that defendants who succeeded to their title in 1856, entered into possession in that year, and erected dwelling houses and fences, planted orchards and made lasting and valuable improvements thereon at a further cost of $10,000, and that defendants have resided upon the premises from that time to the present with their families, having the land wholly enclosed with a substantial fence." That the plaintiff acquired the legal title in 1863 with full notice of all the facts constituting the defendants' equity. That the land at the date of the plaintiff's purchase was worth $100,000, and that the consideration paid by him was little more than nominal.

There can be no doubt that the findings support the equitable defence set up in the answer, nor that they entitle defendants to the relief prayed for therein. The findings show a contract to convey on the part of Mrs. Gilroy, to which contract her husband assented; full payment of the purchase money; possession taken by the vendees, and extensive improvements by them, and by the defendants who claim under them by assignment. Nor do we understand the counsel of the appellant to contend that the judgment is not according to the legal effect of the facts as found. The error complained of is that the facts were found on competent testimony, to the admission of which objection was made at the trial.

The position taken by counsel is, that the alleged contract could be proved only by an instrument in writing executed and acknowledged in conformity to the Act of April 17th, 1850, defining the rights of husband and wife. This position, however, is not tenable. The Act of April 17th, applies only to the separate property of women married subseqnent to the passage of the Act, and to property acquired after the passage of the Act by women married before its passage in this State, or married out of the State and residing and acquiring property in it thereafter. That was one of the points determined in Ingoldsby vs. Juan (12 Cal., 564), and the correctness of the decision as to that point has never been judicially questioned. The case was referred to as authority in Morrison vs. Wilson (13 Cal., 496); and in Maclay vs. Love (25 Cal., 383) it was treated as presenting a true exposition of the statute. The construction given to the Act in Ingoldsby vs. Juan, is well borne out, in our judgment, by its fourteenth and fifteenth sections; but if we regarded the question as a doubtful one, we should not now be inclined to re-open it.

The Act of the 16th of April, 1850, "concerning conveyances," has no bearing upon the question of evidence under consideration. Mrs. Gilroy, under the civil law, was competent to contract to convey her separate property, and to convey it with the bare assent of her husband (12 Cal., 564), and her capacity to do both or either was preserved and guarded by the treaty; and she could neither be deprived of the power, nor be unreasonably interfered with in its exercise by either statute or constitutional provision. The Act of April 16th, 1850, prescribes a method by which married women can convey their separate property, but it points out none in which their contracts to convey must be made or evidenced. Nor can it be claimed that the method of conveying and that of contracting to convey, were intended by the Legislature to be identical, for the thirty-eighth section of the Act expressly withdraws executory contracts to convey from its operation. The only statute in this State bearing upon the process by which a woman—married and acquiring separate property anterior to the cession—can bind herself by contract to convey, is the statute of frauds, and its provisions apply indifferently to all persons having the capacity to make

contracts of that character. Cases of part performance of contracts to convey are excepted from the operation of the statute, and may be proved by parol, (Section 10).

The Act adopting the common law, passed April 13th, 1850, did not take away the capacity of Mrs. Gilroy, to contract concerning her property, for that would be to make the Act paramount to the treaty and the Constitution ; and her capacity being given, the only tests to which her contracts can be subjected are those applicable by the common law to contracts at large.

The cases of Selover vs. American Rus. Co., (7 Cal., 274,), Barrett vs. Tewksbury (9 Cal. 15), and Maclay vs. Love, were all considered as following within the Act defining the rights of husband and wife, and were determined with sole reference to its provisions. That Act not only prescribes how a married woman shall convey, but dictates a special process in conformity to which alone she can contract to convey, and the numerous cases cited by counsel from other States were decided under statutes containing kindred provisions.

It is a matter of no moment that the contract of Mrs. Gilroy as found, did not run, in terms, to Allen and Smith and their heirs. The finding is that she bargained and sold the land to them for a full and valuable consideration. The rule that a fee simple passes only by a deed running to the grantee and his heirs, was of feudal origin ; and if on foot in this State at the date of Mrs. Gilroy's contract, it must be considered as operating only upon cases following within its letter. It was long since settled that the rule was not applicable to devices, and we know of no ground upon which it can be extended to contracts to convey, (in all cases of contract the intention of parties is to determine by the language taken in its ordinary sense, unembarrassed by any mere technical rule ;) and the terms of the contract now in question clearly call for the largest estate that can be had in land.

Judgment affirmed.

BARRON *v.* FRINK.—No. 965.

Where a complaint in an action on contract contained three counts, *one* of which was *radically defective*, and a general verdict for damages was rendered in favor of the plaintiff on the *whole complaint ; Held*, that the judgment rendered on such verdict was erroneous, and the same was reversed on appeal.

In an action on an executory contract for the sale and delivery of a certain quantity of hay at a certain price per ton, the plaintiff alleged in *one of the counts*, the delivery of, and payment for, a portion of the hay, and claimed to recover damages for the balance, but *failed to allege either a readiness or offer to deliver the balance ; Held*, that the count was fatally defective, and that the judgment rendered on such count, after verdict, must be reversed—the defect being one of substance and not cured by the verdict.

Where there are several counts in a complaint, some good and some bad, and a *general* verdict is taken, the verdict cannot be sustained, for the reason that it is not certain on *which* of the *counts* it was founded : per CURREY, Ch. J.

In an action on an *executory* contract for the sale and delivery of personal property, the plaintiff cannot recover without *averring* and *proving* a *readiness and willingness*, or an *offer* on his part, to deliver the property contracted to be sold : per CURREY, Ch. J.

Though a court will intend after verdict, in support of the verdict, that facts *imperfectly* alleged have been proved, it cannot presume that a *material fact not at all stated* has been proved : per CURREY, Ch. J.

Nothing will be presumed after verdict but what is *expressly stated*, or what is *necessarily implied from the facts stated* : per CURREY, Ch. J.

Per curiam, CURREY, C. J.

The defendant agreed in writing to purchase of the plaintiff a quantity of pressed hay, estimated to amount to one hundred and ninety-three tons, at the price of thirty-five dollars a ton in gold coin, which he promised to pay as follows : One thousand dollars upon the execution of the agreement, which was dated the 29th of October, 1864 ; one thousand dollars in thirty days from that date, and the balance as the hay should be removed by the defendant from the place where it then was in stack. The agreement further provided that the hay should be weighed at the stack, and the amount ascertained by such weighing, and that all the money—the price thereof—should be paid before the expiration of four months from the date aforesaid, and that the hay should be removed by the defendant within that time.

The complaint contains three counts. The first sets forth the agreement in *haec verba*, with averments that thereby the defendant agreed to purchase from the plaintiff, and the plaintiff agreed to sell to the defendant the hay, at the price mentioned, which the defendant was to pay in full on or before the 29th of February, 1865 ; that the amount of said hay was one hundred and ninety-three tons ; that the defendant had paid on account thereof four thousand three hundred and fourteen dollars and

sixty-five cents, and that there was remaining due the plaintiff two thousand four hundred and forty dollars and thirty-five cents, which the defendant failed and refused to pay, though thereunto requested. The second count is a common count for goods, wares and merchandise by the plaintiff sold and delivered to the defendant; and the third, a common count for goods, wares and merchandise bargained and sold by the plaintiff to the defendant. The defendant answered, traversing generally the allegations of these respective counts of the complaint, and also traversing specially the plaintiff's right to recover, by reason of a breach of the agreement on his part. The cause was tried before a jury, who found a verdict for the plaintiff in the sum of twenty-one hundred dollars, which the defendant on motion sought without success to have set aside and a new trial granted. From the judgment entered on the verdict, and from the order refusing to grant a new trial, the defendant has appealed.

The appellant asks this Court to reverse the judgment on the ground that the first count of the complaint is radically defective —that is, that it does not state facts sufficient to constitute a cause of action.

The first count of the complaint is upon the contract set forth, but it does not contain any averment of performance of it or readiness to perform it on the part of the plaintiff. If radically insufficient on this ground, the judgment must be reversed, notwithstanding the other counts may be good, for the reason that the verdict is general, and it is not certain upon which of the counts it was founded. (Hunt *v.* The City of San Francisco, 11 Cal., 258; 1 Chitty's Pl., 411; Gibbs *v.* Dewey, 5 Cow., 505; Barnes *v.* Hurd, 11 Mass., 59.)

The contract between the parties was executory; each had something to perform thereafter before the other could be placed completely in default. Each was required to perform his part of the contract, or offer to perform it, or show himself ready to perform it, before a cause of action could arise in his favor against the other. The portion of the hay in possession of the plaintiff when this action was brought remained to be delivered. The delivery of it was the duty of the plaintiff upon proper demand and performance on the part of the defendant, and if for any just cause it was not delivered the plaintiff ought to have

averred his offer or readiness to deliver it upon performance of the defendant of his agreement. In Durham *v.* Mann (4 Selden, 512) it was held that in an executory contract for the sale of a quantity of iron, to be paid for on delivery within a certain period, the obligations of the one party to pay and the other to deliver were mutual and dependent; and that in an action by the seller for the price, it was not enough simply to show the default of the purchaser, but that he must show he was ready or offered to deliver the property. That whichever party in such case seeks to enforce the contract against the other must show performance, or a tender of performance, or a readiness to perform on his part, and that until that is shown he himself is in default.

There is no rule of law better settled than that the allegations and proofs must correspond; and though sufficient may be proved to entitle a plaintiff to recover, provided his complaint contains the essential averments, yet unless the complaint contains facts constituting a cause of action a recovery and judgment in the action cannot be sustained. In Bartlett *v.* Crozier (17 John., 457), Judge Kent said: "The Court are never to presume a cause of action, even after verdict, when none appears;" and in support of his opinion he quotes the language of Lord Ch. B. Gilbert, that "if anything essential to the plaintiff's action be not set forth there, though the verdict be found for him, he cannot have judgment; because, if the essential part of the declaration be not put in issue, the verdict can have no relation to it, and if it had been put in issue it might have been false. And such matter as is the foundation of the action not being alleged, there is no ground for the judgment." The Court will intend after verdict in support of it that facts imperfectly alleged have been proved, but they cannot presume that a material fact not at all stated has been proved. (Id., 458; Rushton *v.* Aspinall, Doug., 679.) It was said by Justice Buller, in Spieres *v.* Parker (1 T. R., 146), that nothing is to be presumed after verdict but what is expressly stated in the declaration, or what is necessarily implied from the facts which are stated. (See also Bishop *v.* Haywood, 4 T. R., 470.) We think the first count of the complaint radically insufficient for the reasons above indicated.

Judgment reversed and new trial ordered.

THE NAPA VALLEY RAILROAD COMPANY *v.* THE BOARD OF SUPERVISORS OF NAPA COUNTY.—No. 1,042.

Where, by an Act of the Legislature of this State, the Board of Supervisors of Napa County were authorized and empowered to take and subscribe to the capital stock of the Napa Valley Railroad Company, an amount equal to the then indebtedness of the company, but not exceeding $30,000, and issue and deliver to said company the bonds of said county in payment of and for said subscription, and receive therefor certificates of paid stock of said company equal to the amount of the bonds so delivered, which subscription was required to be made by said Board of Supervisors as soon as practicable, and within *three months* after the passage of the Act; and the Board of Supervisors having neglected to issue such bonds within the three months; *Held*, that the issuing of the bonds was an act which concerned the *public interest*, and might be insisted on as a *public duty*, and that a *mandamus* would lie to compel the performance of such duty by the Board of Supervisors; and *Held*, further, that it made no difference, whether the railroad, for which such subscription was to be made, was already *constructed and completed*, or whether it was merely *in process of construction*: and *Held*, also, that such act of the legislature was a *constitutional* exercise of the legislative power, and that it was embraced within the grant of the power of *taxation*.

Where a public body or officer has been empowered to do an act which concerns the *public interest*, the execution of the power may be insisted on as a *duty*: per SHAFTER, J.

The power of appropriation of the Legislature over the revenues of counties, cities or towns, is co-extensive with its power over the revenues of the State: per SHAFTER, J.

Per curiam, SHAFTER, J.

This is a petition for a mandamus to the Board of Supervisors of Napa county to compel them to subscribe the sum of $30,000—the amount of the present indebtedness of said company—to the capital stock of the Napa Valley Railroad Company. The petition is based upon an Act passed at the last session of the Legislature, entitled "An Act concerning the Napa Valley Railroad, authorizing an election and other matters relating thereto." (Acts 1866, p. 810.)

The case presents two questions, one relating to the construction of the Act, the other to its constitutionality.

First—It is claimed for the appellants that the Act does not command, but simply permits the Board to make the subscription.

The fifth section of the Act is as follows: "The Board of Supervisors of Napa county are hereby authorized and empowered to take and subscribe to the capital stock of the Napa Val-

ley Railroad Company an amount equal to the present indebtedness of said company, and not exceeding $30,000, and issue and deliver to said company the bonds of said county in payment of and for said subscription, and receive therefor certificates of paid stock of said company equal to the amount of said bonds so delivered. * * * The subscription provided for in this section shall be made as soon as practicable by said Board of Supervisors, and within three months from the passage of this Act."

According to a well settled rule of construction, where a public body or officer has been "empowered" to do an act which concerns the public interest, the execution of the power may be insisted on as a duty, (Mayor of the City of New York *v.* Furze, 3 Hill, 615; Cook *v.* Spears, 2 Cal., 412—Smith's Comm., p. 727.) Railroads concern the public interest as matter of legal judgment, (Beekman *v.* The Saratoga R. R. Co., 3 Paige, 45; Clarke *v.* City of Rochester, 5 Ab., 124); and however that conclusion may be opposed to the fact in the case at bar, makes no difference, the action of the Legislature on the question not being open to review by the judicial department of the Government. If then the section quoted did no more than "empower" the Board of Supervisors to sign for the stock, the Board would have no discretion in the matter. But the section, after conferring the power to subscribe, provides in terms that the power "shall be" exercised within three months. The language here is the very language of command, and settles the question by direct action without resort to reasoning.

Second—The counsel of the appellant admits in a general way the power of the Legislature to compel a county to subscribe to the capital stock of a Railroad Company within its limits or without them, and irrespective, too, of the wishes of its inhabitants, except as expressed through their representatives in the Senate and Assembly, (Pattison *v.* The Board of Supervisors of Yuba county, 13 Cal., 198.) But it is urged that this power is limited to cases where the road, whose stock is to be subscribed for, has not been built, but remains to be built; that, as matter of fact, the road in this case was complete both in construction and equipment before the Act of 1866 was passed, whereby all the advantages of the road had been permanently secured to the

county and the public; and that the Legislature in attempting to compel the county to buy into the company after the road had so become an accomplished fact, violated the order of sequence established by the Constitution.

This reasoning is more specious than sound. The scope of the legislative power involved is misapprehended by counsel. The power is not limited by the circumstances mentioned, nor by any circumstance. It can neither be enlarged nor narrowed by averment, in its very nature. Matters *in pais*—that come and go—connecting themselves with one case and not with another—having nothing to do with the constitutional scope of the power, which is the power of taxation. The supposed constitutional order upon which the argument proceeds has no existence in fact as a limitation upon the power. "The Legislature can impose a general tax upon all the property of the State, or a local tax upon the property of particular political subdivisions as counties, cities and towns. The cases in which its power shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualification of equality and uniformity in the assessment. And except as specially restricted, its power of appropriation of the money raised is co-extensive with the power of taxation. It may appropriate them to claims which have no legal obligation and are founded only in justice. The power of appropriation which the Legislature can exercise over the revenues of the State for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town, for any purpose connected with their present or past condition. In creating the law imposing the tax it can prescribe the objects to which the money raised shall be applied." (Blanding *v.* Burr, 13 Cal., 343; People *v.* Alameda County, 26 Cal., 642.) Under the rule stated in the foregoing citation—and we have no doubt of its entire correctness—the power of a State over a county and its revenues is as its power over all the counties—that is, as its power over the whole people; and that a State Legislature, in the absence of clear and positive prohibition, may authorize the building of a railroad on State account, or make the State a subscriber to the capital stock of one already construct-

ed or to be constructed in the future, and raise money by taxation and appropriate it to defraying the expenses in the one case and to a payment of the purchase money in the other, are questions which we do not consider as open to controversy. (Beekman *v.* Saratoga and Schenectady Railroad Company, 3 Paige, 45 ; People *v.* Pacheco, 27 Cal., 175.)

Judgment affirmed.

I think it apparent, upon a consideration of the entire Act, that the Legislature intended to impose upon the Board of Supervisors of Napa county the duty of making the subscription in question in this case. I therefore concur in the conclusion attained in the first point discussed in the opinion of Mr. Justice Shafter. I also concur in the views expressed in the judgment. SAWYER, J.

PEOPLE EX REL. ALEXANDER *v.* SWIFT, PRESIDENT OF THE BOARD OF TRUSTEES OF THE CITY OF SACRAMENTO.—No. 770.

The relator, in the year 1863, at the request or suggestion of one or more of the Trustees, but not under authority from the Board of Trustees of the City of Sacramento, performed services and furnished materials in repairing and improving the Police Court-room of said city, and, in 1864, the Board of Trustees accepted the job as having been performed on the city's account, and passed an ordinance appropriating the sum of $574,38 for the payment of the claim : *Held*, that this *subsequent ratification* was within the powers of the Board of Trustees, and bound the city as effectually as an employment in advance would have bound it.

The President of the Board of Trustees having refused to sign a warrant drawn by the Auditor, on the ground that there was no contract binding upon the city, and that the Board of Trustees had exceeded their authority in allowing the claim ; a peremptory mandamus was awarded against the President commanding him to sign such warrant—it appearing that a much larger sum than the amount specified in the warrant remained unappropriated in the fund on which the claim was charged by the warrant.

It being objected that the services were performed in the year 1863, and that under the charter of the city, they could be paid for only from the revenues of that year ; *Held*, that the claim had no existence as such prior to the 17th day of July, 1864, the day on which the Board of Trustees assumed the payment of it by ordinance.

NOTE.—This decision may seem, at first view, to conflict with the decision in *Zottman* v. *San Francisco*, in which it was held that the Common Council of the city of San Francisco, had not the power to make the contract in that case valid, by subsequent ratification. But, there is a wide distinction between the two

cases, growing out of the difference in the powers conferred by the charter of San Francisco, and those existing under the charter of Sacramento. According to the former charter, a contract for work could be given only to the lowest bidder, after notice in the public journals; and the court held in *Zottman* v. *San Francisco*, that the common council could not, by subsequent acceptance or ratification, give validity to a contract, which they had not the power to make originally. But no such clause exists in the charter of Sacramento. And the authorities, particularly the more recent ones, clearly sustain the court in the position that a subsequent ratification, under the circumstances of the present case, is equivalent to original authority. And would not the decision have been right, even though the charter of Sacramento had contained such a clause as that of San Francisco? Was such clause intended to cover the case of ordinary work and labor of almost daily necessity like that of the present case? B.

Per curiam, SHAFTER, J.

This is an application for a peremptory mandamus against the respondent, as President of the Board of Trustees of the City of Sacramento, to compel him to sign a certain warrant drawn by the Auditor on the Treasurer of said city for the sum of $574,38, for work done and materials furnished by the relator in repairing and improving the Police Court-room of said city.

The referee to whom the case was sent to find and report the facts, has found that the services constituting the basis of the relator's claim were not performed under any contract binding upon the city. The relator acted under the direction or on the suggestion of one, or perhaps two, of the three Trustees, but he was not employed by the Board as such. After the work had been performed, however, the Board of Trustees accepted the job as having been performed on the city's account; and in the clear exercise of powers conferred upon them by the charter "to make by-laws and ordinances not repugnant to the Constitution of the United States or of the State of California" (Stat. 1863, p. 416) and "to provide for all necessary public buildings, parks or squares necessary or proper for the use of the city" (Ib., 417), and "to improve and take care of the real estate and personal property of the city" (Ib., 416), and "to examine and liquidate all accounts against the city and to allow or reject the same or any part thereof as it is found legal or illegal" (Ib. 418), the Board passed an ordinance on the 17th of July, 1864, appropriating from the General Fund the sum of $574,38, for the payment of the claim. This subsequent ratification by the Board, within their powers, and according to the

method of contracting pointed out in the charter, bound the city as effectually as an employment in advance would have done. (McCracken *v.* San Francisco, 16 Cal., 592; Zottman *v.* San Francisco, 20 Cal., 96.)

Subsequent to this ratification and on the 14th of August, 1864, a bill of items was made out by the relator and presented to the Trustees, by whom it was allowed, and on the same day the claim was approved by the Auditor. (Acts 1863, p. 421, Sec., 9.) And thereupon a warrant for the amount, payable out of the General Fund, was drawn by the Auditor in favor of the relator.

The respondent justifies his refusal to sign this warrant, not only upon the ground that there was no contract binding the city to pay the relator's claim—a point already considered—but also upon the ground that the claim when presented for allowance was not in the form prescribed by law, in that it did not refer to any law, order or contract authorizing it, and that the Board of Trustees exceeded their authority in allowing the demand without such reference.

This objection is not well founded in fact. It appears distinctly from the report and accompanying evidence that the relator's claim, after it had taken on that shape, as matter of law, by the ratification of July 17th, was presented to and allowed by the Board on the 14th of August, and that the written claim so presented contains a distinct reference to the ratifying ordinance and to the second section of the charter as authorizing it.

It is further objected that the claim originated in the year 1863, when the relator was authorized by one of the Trustees to do the work in question, and that it can be paid, under the charter, only from the revenues of that year. The objection is founded upon an anachronism. The claim had no existence as such prior to the 17th of July, 1864, at which date the Board of Trustees assumed it by ordinance, and the referee has found at the time when the claim was allowed there was the sum of $5,652 16 unappropriated in the fund on which the claim was charged by the ordinance and on which the warrant was drawn.

Let a peremptory mandate issue, according to the prayer.

COUNTY OF MENDOCINO *v.* LAMAR ET ALS.—No. 932.

An action on a recognizance given in a criminal proceeding, is properly brought in the name of the proper county, and not in the name of the people.

In an action on a recognizance, the complaint must aver that the recognizance was *filed in court* or that it *became matter of record;* otherwise it will be bad on *special* demurrer.

A recognizance is an obligation of record; and in an action on such obligation, it should be alleged that the same was a record: per SHAFTER, J.

Per curiam, SHAFTER, J.

This is an action upon a recognizance given in a criminal proceeding. The complaint was demurred to on the ground that the right of action was not in the county but in the people; and that the complaint, furthermore, did not contain facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants declining to answer, judgment was entered against them in due course. The appeal is from the judgment.

First—The action is properly brought in the name of the county. Where a defendant convicted in criminal proceeding is unable to pay the costs, or where he is acquitted, the costs become a county charge, and all fines and forfeitures, when collected in any Court in this State, are to be applied to the payment of the costs in which the fine was imposed or in which the forfeiture was incurred; and after such costs have been paid, the residue is directed to be paid to the County Treasurer of the county in which the Court is held. (1 Hit. Dig., Arts. 2266, 2281, 2282.) The county has a direct interest in the collection of the amount due on the recognizance. If collected, the county will be relieved of the necessity of raising money for the payment of the costs by a resort to taxation; and in the event of a surplus, the surplus will belong to it by force of the legislative direction that it shall be paid into the county treasury.

Second—It is objected that the complaint does not aver that the recognizance was filed in Court or that it became a matter of record. This is stated as a special ground of demurrer. The objection is well taken. "A recognizance is an obligation of record. Without record there is no recognizance; and

in an action on such obligation it should be alleged that the same was a record." (People *v.* Huggins, 10 Wend., 472; Ridge *v.* Ford, 4 Mass., 641; Turbell et al. *v.* Gray, 4 Gray, 445.)

Judgment reversed and cause remanded, with leave to plaintiff to amend complaint within twenty days after notice of filing of remittitur.

BUTTERFIELD *v.* THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA.—No. 847.

Action of trespass *quare clausum fregit*, Defense, that the entry on the *locus in quo* was made under authority from Congress, and that the *locus in quo* was a part of the public lands of the United States. On the trial, the plaintiff, to show title, offered in evidence a certificate of location from the Register of the United States Land Office at Marysville, of the quarter section containing the *locus in quo*, under a Military Bounty Land Warrant issued by the United States. To this evidence the defendant objected; and the court excluded the same on the ground that it did not show that the plaintiff had such title from the United States as would enable him to sustain the action. The plaintiff then offered to prove that he was in possession of the land at the time of the commission of the alleged trespass. An objection to the evidence, on the ground that mere possession did not give the plaintiff any claim to damages, where they were not malicious nor unnecessary, was also sustained by the court. It was admitted by the plaintiff in open court that the defendant was the corporation named in the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862, and that the trespasses alleged in the complaint were committed in the construction of the defendant's railroad over the *locus in quo*, and that no unnecessary damage was done. The plaintiff having been nonsuited, *held*, on appeal, that, as the party must, before the certificate of location was issued to him, have delivered to the Register and Receiver the warrant, with his application to locate the particular quarter section therein described, and as, upon the completion of the location, the warrant operated in payment for the land, the party locating the warrant must be deemed, *prima facie*, to have acquired an interest in the land located; and *held*, further, under the act of the Legislature of this State, passed in 1859, which provides that "the certificate of purchase or location of any lands in this State issued or made in pursuance of any of the laws of the United States, or of this State, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase or location," that the certificate offered in evidence was a certificate not only of *location*, but of *purchase* also, and was, as against the defendants, *prima facie* evidence that the land had, to every just intendment, become the property of the holder and locator of the land warrant; *held*, also, that the court below erred, not only in excluding such certificate of location, but also in excluding the evidence offered to prove the plaintiff's possession of the *locus in quo* at the time of the alleged trespass. The judgment of nonsuit was, consequently, reversed, and a new trial ordered.

Per curiam, CURREY, C. J.

The plaintiff brought his action against the defendant for damages for an alleged trespass upon the north-east quarter of section eleven, north of range six, east of Mount Diablo meridian, of which he alleges he was the owner in the possession thereof. The alleged trespass consisted of the defendant's entry upon the land mentioned and the location of the Central Pacific Railroad thereon. The plaintiff alleges in his complaint that the defendant by laying the railroad across said land has deprived him of the use of five acres of it, besides destroying the fences so as to expose the balance of it to the trespasses of cattle, sheep and swine, and that defendant threatens to continue from day to day the like acts of trespass; and therefore, in addition to a claim for damages, the plaintiff asks that the defendants and its agents, servants and employes, may be perpetually restrained from a continuance of the wrongs and injuries threatened.

The material allegations of the complaint are controverted by the answer; and for further answer the defendant avers that said land was and is a part of the public lands of the United States, and that by Act of the Congress of the United States, a grant had before the time of the commission of the alleged trespass been made to the defendant of the right to construct the Central Pacific Railroad upon and over the particular piece of land in question, and that the entry of the defendant thereon and the appropriation of the land taken for such road was under and by authority of the Act of Congress.

To maintain the issue on his part the plaintiff offered in evidence at the trial a certificate, which reads as follows:

"Military Bounty Land Act of March 3, 1855.

"REGISTER'S OFFICE, MARYSVILLE,
"September 20, 1858.

"Military Land Warrant No. 79,801, in the name of Allen J. Tackett, has this day been located by Allen J. Tackett upon the north-east quarter of Section No. 25, in township eleven north, of range six east, Mount Diablo meridian.

"(Contents of tract located, 160 acres.)

"E. O. F. HASTINGS, Register."

In connection with this certificate the plaintiff proved the signature thereto to be that of E. O. F. Hastings, and that he was

the officer indicated thereby; and then further offered in evidence deeds of conveyance showing that whatever title accrued to said Tackett, had been conveyed to the plaintiff before the commission of the trespasses complained of. To the certificate the defendant's counsel objected on the ground that it was irrelevant and incompetent evidence, that the same was not authorized by law, nor did it show that plaintiff had such a title and interest in the premises as to entitle him to maintain his action against the defendant: that the same did not show the land to have ceased to be public land at the time the alleged trespass was committed. At this stage of the trial the parties admitted in open Court that defendant was the corporation mentioned in the Act of Congress entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, and that the acts alleged in said complaint were done in the construction of the railroad of said company over said premises, and that no unnecessary damage was done thereby. Thereupon the Court sustained the objection on the ground that the evidence offered did not show that plaintiff had such title from the United States as would enable him to sustain the action. To this ruling the plaintiff excepted.

The plaintiff then offered to prove that he was in possession of the land at the time of the commission of the alleged trespass. To this, the defendant objected on the ground that mere possession did not give the plaintiff a right of damage, when they were not malicious or unnecessary. The Court sustained the objection and the plaintiff excepted.

The defendant applied to the Court to grant a nonsuit, which was done, and the plaintiff excepted, and thereupon judgment was entered for defendant against plaintiff.

On appeal the plaintiff assigns the above rulings of the Court as errors.

It was stated by the plaintiff at the time the Register's certificate was offered in evidence that it was for the purpose of sustaining the allegations of the complaint that plaintiff was the owner of the premises. No additional evidence was offered or proposed to be introduced to show that the plaintiff had obtained any other title from the Government than the certificate.

The question to be considered is, whether the plaintiff had such a right, title or interest in the land as entitled him to an action against the defendant for damages for the acts done.

The quarter section of land described in the complaint was a part of the Government domain at the date of the certificate which the plaintiff offered in evidence, and we are to presume from the action of the officers of the Government having charge of the disposition of the public lands in the district where this quarter section was situate, that the same was then subject to sale at the minimum or lower graduated price. (10 Stat. at Large, 702, Sec. 5.) From the certificate it appears that the warrant in question was located by the original holder of it. Before the certificate was issued to him, he must have delivered to the Register and Receiver the warrant, with his application to locate the particular quarter section of land described, and upon the completion of the location the warrant operated in payment for the land. (10 Stat. at Large, p. 3, Ch. 19, Sec. 1.) This being done, the party thus locating the warrant must, in the first place, be deemed to have acquired an interest in the land located. (Astwin *v.* Hammond, 3 McLean, 108; Carroll *v.* Perry, 4 McLean, 26; Carroll *v.* Safford, 3 How., 441; Gwyne *v.* Niswanger, 15 Ohio, 368; Ross *v.* Supervisors of Ontaqamie Co., 12 Wisconsin, 38; People *v.* Shearer, 30 Cal.) If for any valid cause such location was annulled by the Commissioner of the General Land Office, the burden was on the defendant to show it.

It was objected by the defendant upon the trial that the certificate upon which the plaintiff relied in support of his alleged right was not competent evidence. By an Act of the Legislature of this State (Laws of 1859, p. 227), it is provided as follows: "The certificate of purchase or location of any lands in this State issued or made in pursuance of any of the laws of the United States, or of this State, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase or location. The certificate offered was a certificate not only of location but of purchase also, and was as against the defendants *prima facie* evidence under this Act of the Legislature that the land had to every just intendment become the property of the holder and locator of the land warrant, and we are of the opinion the Court erred in excluding it, as also in excluding the deeds by and through which the plaintiff deraigned the right and interest of Tackett to the land, and the evidence offered to prove the plaintiff's possession of the land at the time of the alleged trespass.

Judgment reversed and a new trial ordered.