

To hold that this excepted property can pass to the assignee in the face of this language, is to do violence to the intent and to the letter of the law.

This proviso was intended to be and is a "condition, consideration, and compensation" for those parts of the law which provide for involuntary bankruptcy, and I hazard nothing in saying that without the proviso the law would never have been enacted.

If it shall be held that it is necessary for this exempted property to pass to the assignee to make the law uniform, it is obvious that no property can pass, for if a court should hold that property can pass to the assignee which the distinct terms of the law say shall not pass, it would be judicial legislation of the worst character. It would be repealing an express provision of law and substituting one of a directly opposite meaning. J. C. S.

#### ABSTRACTS OF RECENT AMERICAN DECISIONS.

##### SUPREME COURT OF THE UNITED STATES.<sup>1</sup>

##### SUPREME COURT OF MASSACHUSETTS.<sup>2</sup>

##### SUPREME COURT OF NEW YORK.<sup>3</sup>

##### SUPREME COURT OF PENNSYLVANIA.<sup>4</sup>

##### ASSUMPSIT.

*Implied Promise to pay for Board or Services.*—The law will not imply a promise to pay for board or services, as among members of the same family and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears: *Wilcox, Administratrix, &c., v. Wilcox*, 48 Barb.

##### BAILMENT.

*Time of Delivery.*—A dyer received from a customer goods to dye and gave this ticket: "H. J. Lance, dyer and scourer, Nos. 132 and 137 Third Street, Pittsburgh, Pa.—No goods delivered without return of this ticket—good for one year—No. 672—price \$1.50." *Held*, that the contract for delivery was not binding after the year: *Lance v. Griner*, 53 Penna.

<sup>1</sup> From J. W. Wallace, Esq., Reporter; to appear in 5 Wallace's Reports.

<sup>2</sup> From Hon. Charles Allen, Reporter; to appear in Vol. 13 of his Reports.

<sup>3</sup> From Hon. O. L. Barbour, Reporter; to appear in Vol. 48 of his Reports.

<sup>4</sup> From P. F. Smith, Esq., State Reporter; to appear in 53 Pa. State Rep.

*Right of Bailee to Damages for Injury to Property.*—One in the possession of and using property as a bailee for hire, may recover damages for an injury thereto: *Bliss v. Shaub*, 48 Barb.

BLOCKADE. See *International Law*.

#### BREACH OF PROMISE.

*Rule for Damages.*—In an action brought by a woman for breach of promise of marriage, no special damages were alleged in the declaration, but the judge instructed the jury that, in estimating the damages, they might take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of a marriage which would have given her a permanent home and an advantageous establishment; and that, if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections was to be considered as an additional element of damages; and that they might take into consideration generally whatever mortification and pain of mind she suffered resulting from a refusal by the defendant to fulfil his promise. *Held*, after verdict for the plaintiff, that the defendant had no ground of exception: *Harrison v. Swift*, 13 Allen.

#### CONDITION.

*What will amount to Condition at Common Law, breach of which will incur Forfeiture.*—Whether words in a devise constitute common-law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular expression in the devise, but from the whole instrument: *Stanley v. Colt*, 5 Wall.

The word *provided*, though an appropriate word to constitute a common-law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust: *Id.*

*Ex. gr.* Where a testator devised real estate to an ecclesiastical society for its use or benefit: "*Provided*, that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he appointed to manage it, and with a view to the greatest advantage of the society. *Held*, that the latter being to be regarded as mere limitations in trust, the former was a limitation in trust also; not a common-law condition: *Id.*

#### CONSTITUTIONAL LAW.

*Forfeiture of Citizenship for Desertion under Act of Congress.*—The Act of Congress of March 3d 1865 imposes forfeiture of citizenship and its rights, as an additional penalty for the crime of desertion; it is therefore highly penal and must receive a strict construction in favor of the citizen: *Huber v. Reily*, 53 Penna.

Every new refusal of a drafted man to render service, is a public

offence, for which Congress may impose a penalty, and the Act of 1865 is not *ex post facto*: *Id.*

The power to determine who shall or shall not be a voter in a state belongs to the state itself, and the Constitution of the United States gives Congress no power to prescribe the qualifications of electors in the states: *Id.*

Congress may deprive a citizen of the opportunity to enjoy a right belonging to him as a citizen of a state, even the right of voting, but cannot deprive him of the right itself: *Id.*

Congress may as a penalty, impose upon a criminal, forfeiture of his citizenship of the United States, and if the constitution of a state allows only citizens of the United States to vote, Congress may thus affect the number of votes: *Id.*

The Act of Congress of 1865 is not an attempt to prescribe the qualifications of voters in a state; it merely punishes the offender for violating the federal law, by depriving him of his citizenship of the United States: *Id.*

"Due process of law" ordinarily includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of proceeding: *Id.*

A judge of election or board of election officers is not a judicial tribunal to ascertain the guilt of a public offender, and a trial before such officers is not "due process of law:" *Id.*

It is not "due process of law," where the judgment is not final, and leaves the accused exposed to another trial in another tribunal: *Id.*

The Act of 1865 is one of a series of acts respecting the crime of desertion, and must be interpreted with them all in view: *Id.*

The Acts of Congress relating to desertion all contemplate a regular trial and conviction prior to inflicting a penalty, and courts-martial are constituted for such trials: *Id.*

The 21st section of the Act of 1865 refers to pre-existing laws relating to desertion, with the single object of increasing the penalties, but does not change or dispense with the machinery for punishing the crime. It is to be read as if incorporated into the former acts: *Id.*

The forfeiture prescribed must be *adjudged* to the convicted person, after trial by a court-martial and sentence approved: *Id.*

A citizen drafted into the service of the United States, who had notice but refused to report and was registered as a deserter, under the Acts of Congress, is nevertheless entitled to vote, unless he has been convicted of desertion by a court-martial: *Id.*

#### CONTRACT.

*In restraint of Trade.*—A contract made between citizens of this Commonwealth, by which one of them agreed, for a good consideration, never to "set up, exercise, or carry on the trade or business of manufacturing and selling shoe-cutters at any place within the Commonwealth of Massachusetts," is illegal, as being in restraint of trade; although the manufacture of shoe-cutters is an art which can only be carried on by persons instructed in the same, and at the time of making the above contract the person so promising was ignorant of said art, and his said

promise was made as a part of an agreement of partnership with one who was skilled and actually engaged in carrying on the same, and to take effect at the expiration of the partnership, and although at that time only three other persons were engaged in the business: *Taylor v. Blanchard*, 13 Allen.

## CORPORATIONS.

*Denial of Legal Existence.*—In an action by a banking association organized under the Act of Congress, the defendant has a right to deny, in his answer, the legal existence of the plaintiff as a corporation; but an issue of that kind should not be tried by affidavits on motion: *The National Bank of the Metropolis*, 48 Barb.

## DAMAGES.

*Interference of Vendor with Performance of Contract by Vendee.*—Morgan sold to Negley coal, with privilege to change a railroad on Morgan's land. Negley commenced the road, but at Morgan's suit was restrained by an injunction which was afterwards dissolved. Negley, without constructing the road, sold to another and brought suit on the injunction bond. *Held*, that the difference between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and improperly submitted to the jury: *Morgan v. Negley*, 53 Penna.

Had the property continued in the hands of Negley and had he finished the road at an increased cost, it would have been a proper subject for damages: *Id.*

## DEBTOR AND CREDITOR.

*Creditor's Bill—Other Creditors may come in without formal Order.*—The practice of permitting judgment-creditors to come in and make themselves parties to a creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be reversed because the party so coming in has not obtained an order of court to come in; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained: *Myers v. Fenn*, 5 Wall.

*Semble*, that in Illinois, in the case of a perfectly fair assignment for the benefit of creditors, where the trust will give considerable trouble, and property assigned is of a sort that little or no cash will pass into the hands of the assignee, a payment by the debtor previously to the assignments being made, of a certain sum on account of commissions, need not of necessity vitiate the assignment: *Id.*

*Right to prefer Creditors—Transfer of Property for Payment of Debts.*—A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate his private property to the payment, primarily, of his private debts, in preference to the partnership debts, by conveying and transferring such property to his private creditors, in payment of their just demands; and such conveyances and transfers will be valid; where there is nothing to impeach the good faith of the grantees or tending to show that they were privy to any con-

dealment or fraudulent intent or purpose, on the part of the grantor, in disposing of his property: *The Auburn Exchange Bank v. Fitch et al.*, 48 Barb.

An individual may, at all times, convey or turn out his property in payment of his just debts; and this is none the less true because he is straitened in his circumstances and unable to pay all his creditors. At such times he may honestly prefer one creditor to another; and if he sells and conveys his property for a fair price, in payment of just debts, the legality of the conveyances or transfers cannot be questioned. Fraud cannot be predicated upon such a transaction, on the assumption that the debtor meant to defraud his creditors: *Id.*

The law is not so unjust as to forbid a son from paying an honest debt to his mother, by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn her son into the street, at the peril of losing the estate: *Id.*

*Fraudulent Intent of Grantees.*—An intent on the part of the grantees to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of the grantor, cannot be imputed or inferred from the fact that such grantees did, in fact, receive transfers of all the property of the grantor, and must have known that his other creditors could not be paid: *Id.*

#### DEED.

*Delivery—Recording.*—Where a deed to A., though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgagee will take precedence of it: *Parmelee v. Simpson*, 5 Wall.

The placing of a deed to a party on record, such party being wholly ignorant of the existence of the deed, and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery: *Id.*

As a general thing a ratification of a grantor's unauthorized delivery can be made by the grantee; but not when the effect would be to cut out an intervening mortgage for value: *Id.*

.. EASEMENT. See *License*.

#### ENLISTMENT.

*Discharge from—Habeas Corpus.*—Congress has power to pass an act prohibiting the state judges from interfering with enlistments in the army or navy upon *habeas corpus*: *In the matter of O'Connor*, 48 Barb.

The Acts of Congress of February 1862, and of February and July 1864, conferring upon the secretary of war the authority to discharge enlisted minors, upon certain terms and conditions, are to be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges: *Id.*

The Federal Government has, by those acts, assumed such jurisdiction in cases of this kind, as to make it necessarily exclusive.—Per CLERKE, J.: *Id.*

## EQUITY.

*Adequate Remedy at Law.*—The absence of a *plain* and *adequate* remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings: *Watson v Sutherland*, 5 Wall.

Hence, where a creditor of A. levied on goods, a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales—in the possession of B., a young man recently established in trade and doing a profitable business, alleging that they had been conveyed to B. by A. to defeat his creditors—the court, upon being satisfied that they had not been so conveyed, held that the execution had been rightly enjoined; that as at law the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial—loss of trade, destruction of credit, and failure of business prospects—commercial ruin, in short—collateral or consequential damages, which might nevertheless ensue, would not be compensated for at law, but were properly prevented in equity: *Id.*

## HIGHWAY.

*Rights of Adjoining Owner to stop Drainage of Water off the Highway on his Land.*—The owner of land which adjoins a highway may lawfully do any acts upon his own land to prevent surface water from coming thereon from the highway; and may stop up the mouth of a culvert built by the selectmen across the highway, for the purpose of conducting such surface water upon his land, providing he can do so without exceeding the limits of his own land: *Franklin v. Fisk*, 13 Allen.

*What is a Defect.*—An object in a highway, with which a traveller does not come in contact or collision, and which is not shown to be an actual incumbrance or obstruction in the way of travel, is not to be deemed a defect, for the sole reason that it is of a nature to cause a horse to take fright, in consequence of which he escapes from the control of his driver, and causes damage: *Kingsbury v. Dedham*, 13 Allen.

## HUSBAND AND WIFE.

*Evidence of Marriage.*—Where there is no proof of actual marriage, —cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is insufficient: *Commonwealth v. Stump*, 53 Penna.

Reputation consists of the speech of the people who have an opportunity to know the parties; to be proved by them and not by the wife: *Id.*

Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties or by witnesses present when it was made: *Id.*

Therefore, where the evidence of the contract was the declaration

of the wife that, "about 31 years since she went to the house of A. S. to live with and keep house for him, under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together," *it was held* that there was not proof of marriage in fact: *Id.*

An Act of Assembly legitimating children of a testator after a devise to them had vested, did not relieve the devise from collateral inheritance tax: *Id.*

The court below rejected evidence of declarations of the father, made out of the presence of his wife, that they were not married till after the children were born. *Held*, not to be error: *Id.*

#### INTERNATIONAL LAW.

*Blockade—Contraband of War.*—A blockade is not to be extended by construction: *The Peterhoff*, 5 Wall.

*Semble*, that a belligerent cannot blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation: *Id.*

A vessel destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place, violates no blockade.

Hence trade, during our late rebellion, between London and Matamoros, two neutral places, the last an inland one of Mexico, and close to our Mexican boundary, even with intent to supply, from Matamoros, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation: *Id.*

The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade: the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea: *Id.*

The classification of goods as contraband or not contraband, which is best supported by American and English decisions, divides all merchandise into three classes:—

I. Articles manufactured, and primarily or ordinarily used for military purposes in time of war.

II. Articles which may be and are used for purposes of war or peace according to circumstances.

III. Articles exclusively used for peaceful purposes.

Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege: *Id.*

Parts of a cargo described in a ship's invoices as cases of "artillery harness," as "men's army Bluchers," as "artillery boots," and as "government regulation gray blankets," come within the first class: *Id.*

Contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner; and the non-contraband must share the fate of the contraband: *Id.*

In modern times conveyance of contraband attaches in ordinary cases

only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture: *Id.*

But, in determining the question of costs and expenses, the fact of such conveyance may be properly taken into consideration with other circumstances, such as want of frankness in a neutral captain engaged in a commerce open to great suspicion and his destruction of some kind of papers in the moment of capture,—and this although it seemed almost certain that the ship was destined to a port really neutral, and with a cargo for the most part neutral in character and destination: *Id.*

The captain of a merchant steamer, when brought to by a vessel of war, is not privileged by the fact that he has a government mail on board from sending, if required, his papers on board the boarding vessel for examination; on the contrary, he is bound by that circumstance to the strictest performance of neutral duties and to special respect of belligerent rights: *Id.*

Citizens of the United States faithful to the Union, who resided in the rebel states at any time during the civil war, but who during it escaped from those states, and have subsequently resided in the loyal states, or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country: *Id.*

#### LACHES.

*Activity in prosecuting Claim.*—Where, in case of a collision, one of two parties injured institutes proceedings against the vessel in fault, and at his own expense, prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full: *Woodworth v. Insurance Co.*, 5 Wall.

#### LANDLORD AND TENANT.

*Land sold under Execution against the Landlord.*—The lessee of land, sold under a judgment prior to his lease, does not become tenant at will of the purchaser, until after notice of the purchaser's election to determine the tenancy: *Adams v. McKesson's Executrix*, 53 Penna.

Such lessee is as completely the tenant of the purchaser under a verbal lease of less than three years as under a written lease, and under a demise of part of the land as of the whole: *Id.*

One hired to work land and receive as compensation part of the produce, is a cropper, not a tenant: *Id.*

#### LICENSE.

*When irrevocable.*—The rule that a license to do something on the licensor's land followed by expenditure on the faith of it is irrevocable, rests upon the principle of estoppel, because the parties cannot be placed *in statu quo*: *Huff v. McCauley*, 53 Penna.

Equity treats the license thus executed as a contract giving absolute rights: *Id.*