plain and ready a ground of decision could not have been overlooked. It must have been taken for granted that the simple existence of a bankrupt law could not render a common-law assignment *ipso facto* void.

I think the point raised is untenable and that the judgment below should be affirmed with costs.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[2]

SUPREME COURT OF OHIO.[3]

SUPREME COURT OF WISCONSIN.[4]

ADMINISTRATOR.

Commissions—Confederate Money.—Where the intestate's lands are sold under written agreement of the heirs, part of the price being paid cash and the remainder in notes severally made payable to and accepted by the heirs in payment of their respective shares, the proceeds of such sale or notes are not proper matters of his account and he is not entitled to commissions thereon: *Key* v. *Jones*, S. C. Ala.

The administrator is entitled to interest on a balance in his favor originating from over-payments to distributees, but not as a credit in his general accounts. Each distributee should be charged with so much of the balance as was an over-payment to him, with interest thereon: *Id.*

An administrator's compensation is governed by the law in force at the time the services were rendered and not by the law as it stood at the time of his appointment or settlement: *Id.*

When an administrator, exercising diligence, prudence and good faith, accepts payment of a debt due his intestate in Confederate currency, he should be allowed a credit, although the currency depreciates or perishes in his hands, if he has not commingled it with his own funds, or been guilty of negligence or bad faith in not paying it out: *Id.*

AMENDMENT.

Equity Pleadings—Presumption.—Under the Alabama Statute of Amendments, the chancellor, on sustaining a demurrer, should not dismiss a bill without first allowing an opportunity to amend: *Little* v. *Snedicor*, S. C. Ala.

On appeal, where it does not appear that any effort was made, by an

[1] From Hon. Thos. G. Jones, Reporter; cases decided at January Term 1875; the volume in which they will be reported cannot yet be indicated.

[2] From John M. Shirley, Esq., Reporter; to appear in 54 N. H. Reports.

[3] From E. L. De Witt, Esq., Reporter; to appear in 25 Ohio State Reports.

[4] From Hon. O. M. Conover, Reporter; to appear in 36 Wisconsin Reports.

offer to amend, to avoid dismissal, after sustaining a demurrer, it will be presumed that the complainant did not desire to amend: *Id.*

ATTORNEY. See *Name.*

Lien on Judgment recovered by—Conflict of Laws.—The lien of an attorney upon a judgment recovered by him will be enforced according to the law of the state where the lien attached, and not according to the law of the state where the judgment is sought to be collected: *Citizens National Bank* v. *Culver and Trustees*, 54 N. H.

By the law of Vermont, as established by their judicial decisions, an attorney has a lien upon a judgment recovered by him, not only for his term fees, attorney fees, and travelling fees, and for all money expended by him in prosecuting the suit, but also, it seems, for his reasonable charges for arguments, thus covering and securing to him to the full extent all just claims as attorney in the suit: *Id.*

And this lien is there protected so that it cannot be defeated by an attachment of the debt upon which the lien exists by trustee process, even though no notice of the lien had been given by the attorney to his debtor: *Id.*

BANKRUPTCY.

State Insolvent Laws.—Though the General Bankrupt Law of the United States may suspend all state insolvent laws, yet it does not affect the general law for the settlement of insolvent estates of persons deceased. *Hawkins & Co.* v. *Learned*, 54 N. H.

BILLS AND NOTES.

Stamp—Note payable "by" a certain Day.—The validity of a promissory note is not affected by the omission to stamp it, at the time of its execution or at all, unless it be shown that the omission was with a design to evade payment of revenue: *Cole* v. *Cornelius*, S. C. Ala.

A note dated February 2d 1869, payable "by the 1st day of June," is properly declared on as payable "on the 1st day of June 1869." *Id.*

BOUNDARY.

Adjustment by Parol Agreement—Limitation.—Where the boundary line of adjoining landowners, called for in their deeds, and ascertainable with certainty by survey, had been altered by agreement of the parties, and the occupancy by each up to the agreed line, by improvements and otherwise, had been acquiesced in and continued for a sufficient length of time to bar a right of entry, under the Statute of Limitations: *Held*, that an answer setting up these facts constitutes a good defence to an action by one of such owners, or his grantee with notice, for the recovery of the land lying between the two lines: *Bobo* v. *Richmond*, 25 Ohio.

The fixing of a boundary-line by parol is not within the operation of the Statute of Frauds—no estate is thereby created; but where the boundary-line is fixed by the parties, they hold up to it by virtue of their title-deeds, and not by virtue of the parol transfer: *Id.*

COMMON CARRIER. See *Railroad.*

CONFEDERATE MONEY. See *Administrator.*

CONFLICT OF LAWS. See *Attorney.*

CONTEMPT.

Practice—Defect of Jurisdiction—Waiver.—A proceeding to punish for contempt is a special proceeding, *criminal* in its character, in which the state is the real plaintiff or prosecutor; and where the proceeding is against one of the parties to a civil action, for some misconduct or disobedience therein, it should not be entitled as of such action: *Haight* v. *Lucia and Another*, 36 Wis.

Court commissioners have no power to issue attachments for contempt except in those cases (as in proceedings supplementary to execution) where the power is *expressly* conferred upon them by statute: *Id.*

A court commissioner, in a case where he had no statutory authority to do so, issued an attachment against the defendants as for a contempt, returnable to the Circuit Court; and defendants were arrested thereon, and gave bail for their appearance at the Circuit Court to answer for such alleged contempt. After a hearing, the court adjudged them in contempt, and imposed a fine. *Held*, that as the process by which defendants were brought into court was void, the proceedings there were *coram non judice*, and the order must be reversed: *Id.*

Defendants, by litigating the question of contempt in the Circuit Court, *did not waive* the objection to the jurisdiction of the commissioner. Want of jurisdiction of the *subject-matter* cannot be waived: *Id.*

The court cannot confer upon a commissioner powers not given by law; and the facts that the court, in this case, by the terms of a previous order, had authorized, and that it afterwards affirmed, the action of the commissioner, do not affect the question of his jurisdiction: *Id.*

CONTRACT.

Mutuality—Consideration.—If A., proposing to bid as a contractor for certain work to be let by a third party, promises B. to employ him at a certain price to do a part of said work in case A. shall obtain the contract, and B., in consideration of such promise, agrees to do the work at the price named, in the event of A. obtaining the contract—this is a valid agreement, binding on both parties: *Grove and another* v. *Ganger*, 36 Wis.

But a mere offer or promise of B., in such a case, to do the work at a specified price, in case A. shall obtain the contract, without any promise by A. to employ him at such price in the event named, is not a contract, but is void for want of mutuality: *Id.*

CORPORATION.

Estoppel to dispute Corporate Existence.—Where an association of persons, in good faith, attempted to organize as a corporation under the Act of February 11st 1867 (64 Ohio L. 18), and afterward commenced and carried on business as a building corporation, its members and others who have contracted with it as such corporation are estopped in a suit on such contract from setting up the defence of no corporation on account of a defect in its certificate of incorporation: *Hagerman et al.* v. *Ohio Building & Saving Ass.*, 25 Ohio.

The fact that a member of such corporation holds a greater number of shares than is allowed by its by-laws, but not in excess of the number limited by the statute, is no defence against any claim which the corporation may have against him on account of such shares: *Id.*

Criminal Law.

Pleading—Immaterial Averments—When necessary to prove—Bills of Exception.—The description "a freedman," following the name of a person indicted, is mere surplusage and need not be proved: *McGehee* v. *The State*, S. C. Ala.

It is only where the designation or averment is descriptive of the fact or degree of crime, or the jurisdiction of the court, and the like, that an immaterial averment must be proved. *Id.*

Bills of exception are construed most strongly against the party excepting—accordingly where a bill of exceptions recites that "the defendant requested the court to give the following charges in writing, which the court refused, and to the refusal of the court to charge as requested the defendant excepted," it was held that unless all the charges requested should have been given, the court committed no error in refusing them, although one or more of the charges if asked alone should have been given. *Id.*

Servant—Embezzlement.—A person employed at a monthly salary, who, in the discharge of his duties, is subject to the immediate direction and control of his employer, is, in an indictment for embezzlement, properly described as a servant: *Gravatt* v. *The State*, 25 Ohio.

On the trial of a charge of embezzlement, the fact that the money alleged to have been embezzled by the accused was received in several sums, at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction: *Id.*

Where the jury had been instructed as to what was necessary to constitute embezzlement, and that in order to convict the accused the offence must have been committed in the county laid as the venue, instructions directing the jury to inquire as to the county in which the accused formed the criminal intent, disconnected from acts designed to carry such intent into execution, were immaterial, and calculated to mislead, and were therefore properly refused: *Id.*

False Pretences—Locus of the Crime.—In section 12 of the Crimes Act, as amended February 21st 1873, declaring "That if any person, by any false pretence or pretences, shall obtain from any other person," &c.; the word "person," in the latter phrase, includes artificial as well as natural persons: *Norris* v. *The State*, 25 Ohio.

An indictment for obtaining goods by false pretences, is sufficient if it allege that the goods were obtained by the defendant by means of the false pretences, and with the fraudulent intent particularly stated, without other averment that the owner relied upon and was induced thereby to part with the goods: *Id.*

Where A., by false pretences contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offence of obtaining goods by false pretences is complete in the former county, and the offence must be prosecuted therein: *Id.*

Equity. See *Amendment.*

Religious Corporation—Two Claimants.—Where a trust is created for the benefit of an incorporated religious society, and there are two bodies

each claiming to be such society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law: *First Presbyterian Society* v. *First Presbyterian Society*, 25 Ohio.

ESTOPPEL. See *Corporation; Municipal Corporation.*

FRAUDS, STATUTE OF. See *Boundary.*

HUSBAND AND WIFE.

Married Woman's Estate—Gift from Husband's Father—Rights of Husband's Creditors.—A married woman who has money derived by bequest from her husband's father, may, either in person or by her husband as her agent, purchase personal property with such money for herself to use on real estate belonging to her; and the title to such property will be in her and not in her husband: *Smith* v. *Hardy*, 36 Wis.

After a debt secured by a mortgage of personal property became due, the mortgagee accepted from the mortgagor, in settlement thereof, at an agreed valuation, a portion of the mortgage property and certain other personal property of the debtor (on which there was no specific lien in favor of other creditors), in place of a part of the mortgaged chattels, which had been used or sold by the debtor; and he then turned over the whole of the property so accepted, as a gift, to the plaintiff, who was the debtor's wife. *Held*, that if the substituted property was received by the mortgagee at a fair valuation, and applied on the mortgage, plaintiff's title thereto, as against other creditors of her husband, stands on the same footing as her title to the property included in the mortgage: *Id.*

The chattel mortgage in question being given by the debtor, X., to his father, and the question being whether it was valid as against certain creditors of X., the jury were instructed that "if there was a valid subsisting *bonâ fide* indebtedness of X. to his father, the latter had a right to exact security for the payment thereof, and X. had the right, as against other creditors, to secure his debt by a chattel mortgage which would enable his father to hold the mortgaged property as security for such debt; but if it appeared that this was done, not for the object of protecting the rights of the father, but as a mere cover of the property, to keep from other creditors of X., then the mortgage was invalid." *Held*, that this must have been understood by the jury as equivalent to an instruction that if the mortgage was given with intent to hinder, delay or defraud the other creditors of X., it was void as against them (R. S., ch. 108, sect. 1); and there was no error: *Id.*

INSURANCE.

Change of Ownership.—A., owning personal property, gave to B. a mortgage of the same to secure a debt he owed him, after which he procured an insurance upon said property, and had the policy issued to and in the name of A., but payable in case of loss to B., as his interest might appear. Afterwards B. bought one undivided half of this property, giving up the mortgage-debt in part payment for the same, and entered into partnership with A. in business and in the use of said property. *Held*, that there was no need for any transfer or assignment of the pol-

icy of insurance; and that in case of loss, the creditors of the firm would hold the funds in the hands of the insurance company upon the trustee process in preference to the creditors of either of the individual partners: *Burbank & Son* v. *McCluer & Co. and Trustees*, 54 N. H.

Intoxicating Liquors.

Ale and Cider.—Whether ale and cider, after the process of fermentation is completed. are intoxicating liquors, within the meaning of Gen. Stats., chap. 99, which forbids the sale of intoxicating liquors except as therein provided, is a question of fact for the jury: *State* v. *Biddle*, 54 N. H.

Judgment.

Control of Court over.—The power of a court to vacate, alter or amend a judgment which it had jurisdiction to render, ends with the term, except as to the correction of clerical errors where the record furnishes matter upon which to base them: *Pettus* v. *McClannahan*, S. C. Ala.

Void judgments may be set aside after the expiration of the term, but to authorize this the invalidity of the judgment must appear on the face of the record and not from matters *dehors* the record, except in cases of fraud, and where the party for or against whom judgment was rendered died before its rendition: *Id.*

Jurisdiction. See *Contempt.*

Landlord and Tenant.

Liability for condition of Premises—Implied Contracts.—A landlord who negligently constructs his premises, or, when they become defective, negligently suffers them to remain so, is liable to his tenant or a stranger who being himself free from fault is injured thereby: *Scott* v. *Simons*, 54 N. H.

There is no implied warranty on the part of a landlord of leased premises that they shall be fit for use: *Id.*

There is no implied contract on the part of a landlord of leased premises that he will keep them in repair: *Id.*

Mandamus.

Purpose of Officer.—Mandamus is a compulsory, not a revisory writ; and lies to compel action not to correct error. It will issue to compel the performance of a duty or the exercise of a power, only where the relator has a clear legal right to demand it and is without any other adequate and specific remedy: *Ex parte Harris*, S. C. Ala.

Mandamus is not the proper remedy to try the right to a public office, of which there is a *de facto* incumbent: *Id.*

The approval of the official bond of a public officer is the exercise of power in its nature judicial, not ministerial. The cases of *State ex rel.* v. *Ely*, 43 Ala. 568, and *Ex parte Candee*, 48 Ala. 386, overruled as to this point: *Id.*

Where the governor, on a certificate of vacancy in office, caused by the failure of the person elected to file his bond within the time prescribed by law, appoints another to the office and commissions him accordingly, such person becomes an officer *de facto*. A quo warranto, or

information in the nature of quo warranto, and not mandamus, is the proper remedy to try his title to the office: *Id.*

MORTGAGE.

Parol Mortgage of Personal Property.—An equitable mortgage of personal property, enforcible in a court of chancery, may be created by a verbal agreement: *Shelburne et al.* v. *Letsinger*, S. C. Ala.

The party seeking to establish such a trust must prove its existence by clear and convincing proof. Casual and indefinite expressions will not suffice: *Id.*

Thus, where complainant showed by several witnesses that the defendant had made declarations, such as that "he would belong that year to complainant;" that "he had pledged to complainant everything he had;" that "by giving up everything he possessed" he had obtained money, &c., and the defendant showed, on the contrary, by several witnesses that complainant had made declarations to the effect that "he had taken no lien or mortgage to secure his debt," there being no proof of the distinct agreement to give a lien or mortgage in any specific property—although several persons, other than the parties, were present or near by when the agreement is alleged to have been made—it was held that the proof was too indefinite and conflicting to establish the trust, and the court reversed the chancellor's decree establishing the trust, &c., and dismissed the bill: *Id.*

MUNICIPAL CORPORATION.

Street Improvements—Estoppel of owner to dispute Assessment.—An ordinance of a town (which was afterward, by the Act of May 3d 1852, organized as an incorporated village), prescribing the mode of assessing charges for street improvements, continues in force as a valid ordinance of the village, if the mode prescribed is consistent with the powers given to the village, on that subject, by the act named: *Neff* v. *Bates et al.*, 25 Ohio.

The owner of lands taken by a village for a public street, without compensation, who, with knowledge that his predecessor in title had undertaken to dedicate the land for such street, permits the street to be improved, under an ordinance assessing the expense on abutting lots, is estopped, as against a contractor, from resisting the payment of the assessment on the ground that the lands so taken were not legally dedicated to the public for that purpose: *Id.*

NAME.

Surname of Attorney sufficient.—Motion to dismiss a suit on the ground that a complaint is not signed by the plaintiff or his attorney is properly overruled when the only evidence is the complaint, which has signed to it a surname followed immediately by the words "plaintiff's attorney." The court is presumed to know attorneys practising before it: *Cole* v. *Cornelius*, S. C. Ala.

OFFICER. See *Mandamus.*

PARTNERSHIP.

Conversion of Funds by Partner.—Where a partnership intrusts money to a member of the firm to be used in the partnership business,

and such member, without the knowledge or consent of his copartners, forms a new partnership relation with another person, to engage in like business, and pays over the money to the new firm, whereby it is lost, he thereby becomes liable to account to the members of the old firm, as for money converted to his own use: *Reis* v. *Hellman*, 25 Ohio.

Payment of Private Debt with Firm Assets.—One partner cannot apply the partnership funds or securities to the discharge of his own private debt without the consent of the other partners, either express or implied: *Caldwell* v. *Scott and Trustee*, 54 N. H.

Nor does it make any difference whether such creditor knew that it was partnership property or not, that was thus applied in payment of his debt: *Id.*

When one partner retires from the firm and releases all his interest in the assets to the other partner, who agrees to pay all the company debts, the right of priority still continues in the partnership creditors in respect to such assets: *Id.*

PLEADING. See *Criminal Law.*

RAILROAD.

Potter Act—Regulation of Freight Charges.—Under the provisions of ch. 273, Laws of 1874 (generally known as the "Potter Act"), where lumber was shipped from Oshkosh, in Wisconsin, by the C. & N. W. Railway Co., consigned to Oconomowoc, *via* Watertown junction, where the road of said company intersects that of the C., M. & St. P. Railway Co., running thence to Oconomowoc (said C. & N. W. Co. having no road between the last named place and said junction), the highest price which the owner could be compelled to pay for the delivery of it at Oconomowoc (there being no reshipment at Watertown Junction, but the same cars running through from Oshkosh to the place of consignment) was $15 dollars per car load—although the C. & N. W. Co. would have been entitled to charge the same price for conveying it to Watertown Junction, if it had been consigned to that place: *Ackley and another* v. *The C., M. & St. P. Railway Co.*, 36 Wis.

On the arrival at Oconomowoc of lumber shipped at Oshkosh for that place in the manner above stated, the owners tendered to the defendant company payment for the transportation thereof for the whole distance, at the rate of $15 per car load; but the company refused to deliver the lumber on the ground that it had lawfully paid the charges of the C. & N. W. Co., at the same rate, for the carriage of the lumber to Watertown, and was entitled to a further compensation for the carriage thereof on its own road between Watertown and Oconomowoc. *Held*, that plaintiffs, having tendered the full rates chargeable for the *whole* carriage, are entitled to possession of the lumber: *Id.*

When goods are shipped by one railroad company in this state for delivery at some point on the line of a connecting road of another company, and charges at the rates allowed by law for the whole distance are collected by one of the companies, the sum should be divided between the two companies upon some equitable principle, to be determined by the courts in case the companies invoke their aid for that purpose: *Id.*

RELIGIOUS SOCIETY. See *Equity.*

STAMP. See *Bills and Notes.*