instant he received them, and *in all events*, except they happened to be damaged by the act of God or of the King's enemies.

This is the case stated by Lord Tenterden in the part of his book above referred to, as one, indeed the principal authority upon the subject; and we entirely concur in it, and it seems to us conclusive in the present case. In our opinion, the application of the principle laid down in this case affords the only true rule for ascertaining with accuracy and certainty the liability of the master and owner of a general ship: viz., that prima facie he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not, is to be ascertained by the terms of this document when it exists. There will therefore be no rule.

After this judgment had been pronounced.

POLLOCK, C. B., said—If, indeed, the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea damage. And

ALDERSON, B,, added—Our judgment does not touch that question. A rat making a hole in the ship may be the same thing as if a sailor made one.

Rule refused.

ABSTRACTS OF RECENT AMERICAN CASES.

New York Court of Appeals, October, 1852.

Agent—Liability of Principal.—Where the plaintiff and defendants were owners of separate parcels of grain which were stored with the same warehouseman, such warehouseman, in delivering the grain, acted as the agent of the owner who directed the delivery,—and such owner was responsible for his acts in regard to such delivery. *Cobb* v. *Dows*. Opinion by GARDINER, J.

So that when the defendants gave an order on the warehouseman to deliver their grain, and by mistake or otherwise he delivered the plain-

tiff's, and not the defendants', whereby the defendants received the benefit of such delivery, as if it had been their own, it was held that the plaintiff can recover the value of the defendants, they being responsible for the wrongful act of the warehouseman, who, in the delivery, acted as their agent. *Ibid.*

Bailment—Advance of Money on Warehouseman's Receipt.—A warehouseman's receipt does not cover any goods, except such as are actually in his possession at the time of giving it, and though assigned to a third person who has in good faith advanced money upon it, does not give him any claim to, or title in property afterwards delivered to the warehouseman. *Gardiner* v. *Snydam.* Opinion by RUGGLES, C. J.

In this case, the defendants advanced money on a warehouseman's receipt, for 536 barrels flour, when it appeared that he had only 211 barrels in his possession at the time. *Held*, the defendants could claim only for the 211 barrels, as against third persons, although the warehouseman afterwards received enough more to fill the receipt. *Ibid.*

Banking Corporations, Powers of.—Every association organized under the Act to authorize the business of banking, and the Acts amending the same, is a moneyed corporation within the meaning of the statutes of this State, relating to moneyed corporations; and is bound and affected by those statutes, excepting only so far as such statutes are inconsistent with the provisions either of the Act to authorize the business of banking, or of the act amending the same. *Pell* v. *The State of Ohio. North American Trust and Banking Company* v. *The Same.* Opinions by GARDINER and EDMONDS, J.J.

Such associations are banking corporations, and possess only authority to carry on the business of banking in the manner, and with the powers specified in said act. *Ibid.*

They have no power to purchase state or other stocks for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received *in good faith*, as *security for a loan* made by, or a debt due to, such association, or when taken in payment, in whole or in part, of such loan or debt. *Ibid.*

Corporation—Illegal Banking—Certificate of Deposit.—The plaintiffs made a loan whereby they received from the borrower certain bonds and mortgages in security for the loan at an interest of 7 per cent., and issued their certificates of deposit bearing 4½ per cent. interest, which they gave

to the borrower as the produce of the loan. *Held*, that the transaction was illegal, as the company, under its charter, had no right to issue such paper, to loan or put in circulation as money. *New York Life Ins. and Trust Co.* v. *Chester Bedee and others.* Opinion by WELLES, J.

Quære? Whether the transaction was not also usurious? *Ibid.*

Criminal Law—Larceny—Robbery on the High Seas—Jurisdiction.—The offence charged against the prisoner was that of having stolen money from a steamboat navigating Long Island Sound, on her passage from New York to Norwich, Connecticut, and when somewhere opposite the county of Suffolk, in this State, and he was therefore indicted for grand larceny committed in the county of New York. *Held*, that the indictment could not be sustained because it did not show whether the prisoner was accused of larceny in New York, or a larceny committed in another county and bringing the stolen property to New York. And the conviction could not be sustained, because Long Island Sound, where this offence was committed, is not a river, lake or canal, within the meaning of our statute, but an arm of the sea. *Manly* v. *The People.*

Judgment reversed, and prisoner ordered to be discharged from custody. Opinions by WELLES and EDMONDS, J.J.

Criminal Law—Murder—Error.—It appearing from the affidavits, that the judgment in this case was actually rendered after the enactment of the statute allowing a writ of error, although from the record the contrary might be inferred, the motion to dismiss the writ of error denied. *The People* v. *Clark.* JOHNSON, J., and RUGGLES, CH. J.

The term "premeditated design," used in our statute, defining murder, has the same signification with the phrases of the common law, "malice aforethought," and "malice prepense," except that it intends express design or malice, and not implied. To constitute murder under our statute, there must be an express design to kill, and if there is such a design, it is enough that it be formed on the instant, and be a part of the fatal blow. *Ibid.*

In cases of deliberate homicide, where there is a specific intention to take life, the offence is murder. The charge of the Oyer and Terminer was therefore right, when it instructed the jury, that if the killing was produced by the prisoner, with an intention to kill, though that intention was formed at the instant of striking the fatal blow, it was murder. *Ibid.*

Criminal Law—Murder.—On a trial for murder, where the Court of Oyer and Terminer charged the jury that "if they believed that the kill-

ing was produced by the prisoner with an intention to kill, though that intention was formed at the instant of striking the fatal blow, it was murder." It was held that the charge was correct, and that no previous meditation was necessary to constitute the crime; the blow being struck with an intention to take life, it is the "premeditated design" specified in the statute. *The People* v. *Sullivan.* RUGGLES, CH. J., and JOHNSON, J.

Debtor and Creditor—Voluntary Assignment—When Valid.—A voluntary assignment made by a debtor under failing circumstances, is void if it contain a clause authorising the assignee to sell the assigned property on credit, because it is calculated to hinder and delay creditors, and reserves to the debtor or the assignee of his own choice, the absolute control over the debtor's property, which in justice, belongs to the creditor, and enables them, instead of the creditor, to determine when the debt shall be paid. *Nicholson* v. *Leavitt.* EDMONDS and GARDINER, J. J.

Eminent Domain—Property taken for public use.—The state in exercising its right of eminent domain, may direct not only as to the quantity of land or property which may be taken for the public use, but also as to the quantity or extent of interest in such property, which may be required or taken for such public use; thus, it may take an estate for life or years, as well as an estate in fee, and where it has been taken in fee or absolute ownership, and paid for as such, it will not revert to the original owner upon the ceasing of the public use. *Heyward* v. *City of New York.* WELLES, J.

Where private property was taken for a public use, as for an alms-house, and the whole value of the owner's interest was assessed and paid for, and he accepted such sum thus awarded, the abandonment of the use of the premises for such public purpose, does not cause the property to revert to the original owner. *Ibid.*

Error—Exceptions—Bills and Notes—Due Diligence—Protest.—The exception being to the whole charge, and some part of the charge being correct, the exception is unavailing. *Hunt* v. *Maybee.* WATSON and EDMONDS, J. J.

Where a party has attempted to protest a promissory note by a notary, and has given evidence thereof, he is not precluded from proving that he has actually protested the note by one not a notary. *Ibid.*

When there is no dispute about the facts, the question whether due diligence has been used in seeking the residence of the endorser, is a question for the court and not the jury. *Ibid.*

Sed quære? Whether it is due diligence to inquire merely of the holders of the note, and such as they may refer them to, and whether inquiry ought not to have been made of the makers, as to the residence of the indorser—the maker living in the same town with the notary? *Ibid.*

Indian Titles—Duties of Commissioners under Treaty.—In a conveyance of lands by the Indians, and in a treaty confirming and authorizing such conveyance, it was stipulated that the grantees should not have possession until the value of the improvements made by individual Indians should be appraised by commissioners, as provided in the conveyance and treaty, and such value paid into the War office, for the benefit of the Indian owning the improvement. The commissioners were prevented from going on the premises, by individual Indians, and reported the aggregate value of the improvements only, and not each one's share, as required by the grant and treaty, certifying that they had been prevented by the force used, &c. Held, that that was not a valid excuse, and that the right of the grantees to the possession, depended upon the individual appraisement as a condition precedent, which not being performed, the grantees were not entitled to the possession. *Blacksmith* v. *Kendle.* Opinions by EDMONDS and WELLES, J. J.

Landlord and Tenant—Lease in Fee—Reservation of Price on Alienation.—In a durable lease, or lease in fee, a clause reserving to the lessor, a portion of the price or consideration money upon a sale of the premises by the lessee or his assigns, is void, because repugnant to the grant of the absolute estate. *Depeyster* v. *Michael.* Opinion by RUGGLES, Chief Judge; GRIDLEY and JOHNSON, J. J.

Landlord and Tenant—Covenant.—Where, in a lease of a pier and bulkhead in the city of New York, the lessee covenanted to make, at his own expense, all the repairs which might be necessary, upon the bulkhead and pier, and upon all extensions which might be made during the term, and to pay all taxes and assessments upon the demised premises during the term, and during the term there was an extension of the pier, under an ordinance of the Common Council, the expense of which was paid by the lessor.

Held, that the extension thus erected was a part of the demised premises, and belonged to the lessee during the term. *Hancox* v. *Jacques.* Opinions by EDMONDS and WATSON, J. J.

Rivers—Right of Riparian Owners to compensation for Soil taken for a Railroad.—The owners of land on the bank of a navigable river, where

the tide ebbs and flows, and whose title extends no further than to high water mark, have no such property in the land under water, or the privilege of using the river as to be entitled to recover damages against a railroad company, who, by grant from the State, construct their road below high water mark, and cut the riparian owner off from access to the channel of the river. *Gould* v. *Hudson River Railroad Company.* Opinions by EDMONDS and WATSON, J. J.

Shipping—Charter Party—Warranty—Damages.—Where, in a charter party the vessel was described as "the schooner J. H., of the burden of 190 tons, or thereabouts, now lying in the harbor of New York," such words were words of description only, and were not a warranty that she was of such a tonnage, or that she was then lying in the harbor of New York. Those are matters open to the inspection of the parties, and will not be regarded as a warranty, unless it is very clear that such was the intention of the parties. *Ashburner* v. *Balchen.* Opinions by RUGGLES Ch. J., and JEWETT, J.

The rule of damages in such case against the charterer who refuses to perform, is the amount specified in the charter party, deducting only such sum as the vessel earned during the time she would have taken to have performed the voyage, and excluding what she might have earned in her return voyage. *Ibid.*

Trust—Compensation of Attorney.—Where a trustee, who held certain lands in trust to receive and pay over the rents and profits, had, together with the *cestui que trust,* employed an attorney to defend the trust estate from attacks made upon it, and which threatened its existence, the attorney can recover compensation for his services in an action against both trustee and *cestui que trust,* seeking to enforce the claim as a lien on the trust estate; it appearing to the court that that was a proper exercise of the discretionary power of the trustee. *Noyes* v. *Blakeman.* Opinions by WATSON and WELLES, J. J.

But where the attorney was employed only by the *cestui que trust,* without the consent or approbation of the trustee, he cannot recover against the trust estate. *Ibid.*

Vender and Vendee—Auction.—An auctioneer has such a special property or interest in the subject matter of the sale, that he may sue for the price in his own name, unless the principal or real owner elect to sue, and it is not necessary to prove any special interest or property; it flows

from his position as auctioneer, and proof that he has no interest, will not defeat the action. *Main* v. *Minturn.* Opinions by EDMONDS and JOHNSON, J. J.

A private sale of the property offered for sale at public auction, made in violation of the statute, does not vitiate the public sale. The object of the statute is to protect the public sale, and its effect is merely to render the private sale void. *Ibid.*

But if it were otherwise, the purchaser at the public sale cannot take advantage of the defect by retaining the property and refusing to pay for it. That would be affirming the contract in part, and rescinding it in part. He must rescind it *in toto*, and in order to do that, he must place all the parties in the precise position they were in before the contract was made. If he cannot do that, he cannot rescind. *Ibid.*

Vendor and Vendee—Mistake as to quantity of land sold.—In a sale of land, where both in the agreement for the sale and in the deed carrying out the agreement, the premises are described as containing so many acres, "more or less," those words being inserted upon deliberation, because neither party professed to know the precise quantity contained in the boundaries of the deed, the courts will not interfere to correct any mistake as to quantity. And where the contract has been consummated without fraud, misrepresentation or concealment, as to the real quantity, the courts will not inquire whether there has been a mutual mistake as to the supposed quantity contained within certain specified boundaries. *Fame* v. *Martin.* Opinions by GARDINER and EDMONDS, J. J.

A mistake of fact between parties, will not be corrected unless it is as palpable as if admitted, and has been so great as to produce the conviction that but for the mistake, the contract would never have been made, and, being made, was entirely different from what was intended. *Ibid.*

Supreme Court of the United States, December, 1852.

Equity—Injunction—Action at Law.—Upon an appeal from a decree of the Circuit Court of the United States, for the Southern District of Mississippi, by which an injunction previously awarded the appellants, was dissolved, and the bill dismissed with costs.

The decision of the Supreme Court upon this appeal propounds no new principle; but explicitly re-affirms the well settled doctrines of equity jurisprudence, as declared by the Court in the cases of *Creath's Administrator* v. *Sims*, and of *Truly* v. *Wanzer* in the 5th vol. of Howard's Reports, the former at page 192, and the latter at page 141, of that volume, cases in their principal features almost identical with this. The bill in this case sought relief from the obligation of a contract for the purchase of slaves, alleged to have been imported into the State of Mississippi, and sold in violation of the constitution and laws of that State. A judgment at law had been obtained against the complainant, Sample, by default, as was alleged by him in consequence of his having been lulled to security by representations from the respondent. After this judgment, and after execution sued and levied thereon, the complainant, Sample, with the other parties to the bill as his sureties, executed a forthcoming bond for the delivery to the officer of the property levied upon, which bond, on being forfeited, had the force of a judgment by the law of the State. The complainant, Sample, did not aver ignorance, on his part, of the alleged illegality of the compact impugned, nor did he disclaim all purpose by him to evade the constitution and laws of Mississippi. The charge of practices by the respondent, by which the complainant was prevented, or would have been excused from making his defence at law, was not sustained by the evidence adduced.

The Supreme Court were of the opinion,—1, That, conceding the contract to have been such as it had been represented by the complainant, Sample, still it shewed him to have been *in pari delicto* with those of whom he complained. 2. That however the nature of the consideration, (if really such as he alleged it to be,) might have shielded him against the attempts of confederates, so far as these should have been urged through the instrumentality of courts of justice, it would have invested him with no rights, no claim to exemption from advantages accidentally obtained by the former, and especially could give him no standing before a tribunal which extends its aid and countenance to those only who can present themselves with pure hands, and as being above suspicion. 3. That the defence, for the first time attempted by the complainant in his bill, was a *legal* defence, and should have been made in the action at law: that after the judgment against the complainant by default, he, by voluntarily executing the forthcoming bond, which he knew had the force of a judgment, had waived all claim to that defence, and in effect given a judgment by

confession. That after these proceedings, to permit the complainant to begin a contest which he had repeatedly declined, would be to permit him to falsify his formal and deliberate acts—would be subversive of the settled practice of the courts, and would lead to endless litigation. *Sample, Appellant*, v. *Barnes, Appellee.* Opinion per TANEY, C. J.

State Legislation—Constitutional Law.—A state, under its general and admitted power to define and punish offences against its own peace and policy, may repel from its borders an unacceptable population, whether paupers, criminals, fugitives or liberated slaves; and, consequently, may punish her citizens and others, who thwart this policy, by harboring, secreting, or in any way assisting such fugitives.

It is no objection to such legislation, that the offender may be liable to punishment under the act of Congress for the same acts, when injurious to the owner of the fugitive slave.

The case of *Prigg* v. *The Commonwealth of Penn'a*, 16 Peters, presented the following questions, which were decided by the Court.

1st. That under and in virtue of the Constitution of the United States, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave wherever he can do it without illegal violence or a breach of the peace.

2nd. That the government of the United States is clothed with appropriate authority and functions to enforce the delivery on claim of the owner, and has properly exercised it in the Act of Congress of 12th February, 1793.

3rd. That any state law or regulation which interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service, is void.

This Court has not decided that state legislation in aid of the claimant, and which does not directly nor indirectly delay, impede or frustrate the master in the exercise of his right under the Constitution, or in pursuit of his remedy given by the Act of Congress, is void. *Eells* v. *The State of Illinois.* Opinion per GRIER, J.

Will—Fraudulent Debtor—Parties to Bill.—A court of equity has jurisdiction of a bill against the administrator of a deceased debtor, and the person to whom real and personal property was conveyed by the deceased debtor, for the purpose of defrauding creditors.

In such a case the Court does not exercise an auxilliary jurisdiction to aid legal process, and consequently it is not necessary that the creditor

should be in a condition to levy an execution, if the fraudulent obstacle should be removed.

It is proper to make a prior incumbrancer, who holds the legal title, and whose debt is payable, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree the prior incumbrancer is a necessary party; but the Court may order a sale subject to the incumbrance, without having the prior incumbrancer before it, and in fit cases it will do so. If the prior incumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his incumbrance, which will not be affected by the decree. *Hagan* v. *Pope.* Opinion per CURTIS, J.

War Contract—Neutrality—Lex loci.—The plaintiffs, in September, 1836, during the war between Mexico and Texas, and before the independence of the latter was acknowledged by the United States, entered into a contract with the defendant, reciting "That the said parties of the first part, being desirous of assisting the said Gen. T. Jefferson Chambers, who is *now engaged* in raising, arming and equipping volunteers for Texas, and who is in want of means therefor, and being extremely desirous to advance the cause of freedom, and the independence of Texas, have agreed to purchase of said Chambers" certain lands, and to pay therefor the sum of $12,500, in certain instalments. Chambers covenanted to hold the legal title to the lands in trust for the use of the plaintiff, and to convey the same with warranty, under the penalty of $30,000 liquidated damages.

On demurrer to a bill to enforce the specific execution of this contract, and averring payment of the consideration, it was decided—1st. That contracts by citizens of the United States, to furnish money to carry on a war by revolted subjects, against a government with whom we are at peace, will not be enforced by a court of equity.

2d. That this contract was in violation of the neutrality laws of the United States, as it might fairly be inferred from the recitals, that the defendant was *then* engaged "in raising, arming and equipping volunteers for Texas" in the United States, and therefore void.

3d. That this contract, being made at Cincinnati, must, in deciding its validity, be judged by the laws of the United States, and not by those of Texas. *Bennett* v. *Chambers.* Opinion by TANEY, C. J.

DANIELS and GRIER, Justices, dissented, on the ground that a contract to convey lands in Texas must be treated as a Texan contract, and its validity judged by the laws of Texas, which could not recognise such a defence.

Selections from 32 Maine Reports.[1]

Abortion.—To procure an abortion, as to a female, pregnant *but not quick* with child, was not, at the common law, an offence, if done with her consent. *Smith* v. *State.*

By our statute the procuring of an abortion is an offence, whether the child had quickened or not, and whether with or without the consent of the mother. *Ibid.*

Bills and Promissory Notes.—In an action against the maker of a note, payable at a specified length of time after its date, brought by an indorsee, who obtained it for value before its apparent pay day, and without knowledge of mistake in its date, the maker, in order to establish a defence that the action was prematurely brought, is not allowed to prove, that by mistake the note bore a date earlier than the day upon which it was actually made. *Huston* v. *Young.*

A subscribing witness to a note need not write thereon for what purpose he affixes his signature. *Farnsworth* v. *Rowe.*

If one write his name on the note, at the place commonly used for attestations, the presumption is, that he writes it, not as a maker of the note, but as a subscribing witness. *Ibid.*

There is no presumption in law that an *unnegotiable* note, of the same amount of a pre-existing book debt, and taken for the debt, was received *as payment* of the debt. *Bartlett* v. *Mayo.*

The recovery and payment of a judgment upon the account would bar an action upon the note. *Ibid.*

In such an action, if it appear that such a note was given, it is not necessary that the plaintiff produce the note or account for its loss. *Ibid.*

Consideration.—To support an action upon a written agreement to pay the debt of another, a consideration for the contract must be proved. *Cutler* v. *Everett.*

From an agreement on a separate paper, to be responsible for the payment of a note, though of the same date, described as having been given by a third person, no inference of a consideration is to be drawn. *Ibid.*

[1] We are indebted for the following abstracts to Mr. Reddington, the State Reporter of Maine, who has obligingly furnished us with the sheets of his forthcoming volume. The abstracts shall be continued in our next number.

Constitutional Law.—It is competent for the State, by legislative enactment, operating prospectively, to determine that articles, injurious to the public health or morals, shall not constitute property. *Preston* v. *Drew.*

If it should so conclude in relation to spirituous or intoxicating drinks, when designed to be used as a beverage, the conclusion would be justified by the experience and history of man, and would furnish no occasion to complain that any provision of the constitution had been violated. *Ibid.*

The general intent and avowed purposes of the Act of 1851, "for the supression of drinking houses and tippling shops," would not be infringed by a construction which should allow the maintenance of actions, except for such liquors as were liable to seizure and forfeiture, and intended for unlawful sale. *Ibid.*

The attaching of such a construction to legislative language, so clear and unequivocal, if within the province of the judiciary department, is perhaps very near to the outward boundary of its power. *Ibid.*

If such a construction should be applied, it would, of course, remove the statute prohibition from all actions brought for liquors, except those proved to have been intended for unlawful sale. *Ibid.*

Without such a construction, the statute prohibition is inoperative, as to actions for any liquors, except those proved to have been intended for unlawful sale, because as to other liquors the prohibition is violative of the State Constitution. *Ibid.*

The requirement of the constitution in reference to search warrants, that "A special designation of the place to be searched" shall be made, is not answered by words, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. *State* v. *Spirituous Liquors; Robinson, claimant.*

Under that constitutional provision, an article to be searched for, may, in the warrant, be described simply by its generic name, if it be destitute of any peculiar and known marks or qualities, by which, in the description, it can be distinguished from other articles of the same general name. *Ibid.*

Thus, a warrant for the search of "spirituous or intoxicating liquors," will not be considered unauthorized for the want of a sufficient designation of the thing to be searched for. *Ibid.*

Contract.—A contract obtained by fraudulent representations cannot be sustained by the fraudulent party to the injury of the party imposed upon. *Pratt* v. *Philbrook.*