body, or make a chemical examination of the contents of the alimentary tube; and, should he be subpœnaed to attend an investigation, it is only admissible to testify as to facts within his own knowledge, and he can refuse respectfully and firmly to go further.

The members of the profession of medicine everywhere are, as a class, beneficent and self-sacrificing, laboring always cheerfully and gratuitously in the cause of humanity and in the service of the destitute. But they, too, must live while they thus labor, and it cannot be expected by government, they should serve the wealthy in their most professional position without the obligation being recognized and requited.

I cannot bring this report to a conclusion without acknowledging the important aid and counsel so cheerfully extended by Drs. D. Francis Condie, of Pennsylvania, and Grafton Tyler, of Georgetown, D. C., my colleagues on the Committee appointed at the Philadelphia meeting of the National Medical Association.

RECENT AMERICAN DECISIONS.

In the Philadelphia Court of Oyer and Terminer.

COMMONWEALTH *vs.* FREETH.

1. The test, in insanity, is the power or capacity of a prisoner to distinguish between right and wrong in reference to the particular act in question.
2. If the prisoner labors under partial insanity, hallucination or delusion, but nevertheless did understand the nature of his act, and knew that it was criminal, and had sufficient mental power to apply that knowledge to his own case, and if he had sufficient memory to recollect his relations to and with others, and that the act committed was against justice and right, and a violation of the dictates of duty, he is responsible. Per LUDLOW, J.

The following charge was delivered to the jury by

LUDLOW, J.—The defence in this case is that the prisoner, at the time of the commission of this offence, was not an accountable being.

If, gentlemen of the jury, this allegation is true, it would be monstrous to punish him, and therefore we find the law to be that if one charged with the commission of crime is so entirely devoid of understanding as to be either an idiot or a madman, he is thereby acquitted of all guilt; he is not criminally responsible to the offended majesty of the law, but becomes at once rather an object of pity than the subject of punishment.

Gentlemen, it is unnecessary for me to say to you that we will be obliged to investigate a most delicate and dangerous subject; nevertheless, we will endeavor to lay down such rules and tests as will enable you to arrive at a satisfactory conclusion.

If the prisoner at the bar, at the time he committed the act, had not sufficient capacity to know whether *his act* was right or wrong, and whether it was contrary to law, he is not responsible. This is, in fact, general insanity, so far as the act in question is concerned, and it must be so great in extent and degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perception of right and wrong.

The test in this instance, as you perceive, *is the power or capacity of a prisoner to distinguish between right and wrong in reference to the particular act in question;* for although a man may be sane upon every other subject, yet, if he be *mad*, to use an expressive phrase, upon the subject, and so far as the act under immediate investigation is concerned, he thereby loses that control of his mental powers which renders him a responsible being. The test thus suggested has been adopted by the judges of England, and by the courts of our own State, and is too well settled to be shaken.

But suppose that the prisoner was able to distinguish between right and wrong, and yet was laboring under *a partial insanity, hallucination or delusion*, which drove him to the commission of the act as a duty of overwhelming necessity, is he in such cases responsible for his acts?

If the delusion were of such a nature as to induce the prisoner to believe in the *real* existence of facts which were entirely *imaginary*, but which, if true, would have been a good defence, he would not be responsible. We, however, desire at this stage of our remarks to refer

rather to other delusions than the class thus spoken of, reserving for future consideration our remarks on this branch of the subject.

That partial insanity, hallucination or delusion, coupled with the power of discriminating between right and wrong, was no excuse for crime, has been ruled to be the law of England, and to this point did the judges of England refer in *McNaughten's* case, 10 Clark & Fin. 210, in their first answer to the questions propounded to them by the House of Lords. This doctrine was also stated to be the law by our predecessors upon this bench in the case of *Commonwealth* vs. *Farkin*, 2 Parsons Se. Eq. Ca., p. 431, and would have remained the law in this State but for the opinion and charge of Chief Justice Gibson in *Com.* vs. *Mosler*, 4 Barr, 266, where the Chief Justice says: "It (insanity) must amount to delusion, or hallucination, controlling his will and making the commission of the act a duty of overruling necessity." And, again, he says: "The law is, that whether insanity be general or partial, it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action."

Medical writers agree that instances constantly occur of the commission of acts of killing by those who not only know that the act about to be committed is wrong, but that punishment is affixed to its commision by law.

We cannot, however, leave this branch of the subject to doubt or uncertainty, and our conclusion is, after a somewhat extended investigation of the law, that the proper rule to be adopted upon the point in question is the following:

If the prisoner, although he labors under partial insanity, hallucination or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and knew if he did the act he would do wrong, and would receive punishment; if, further, he had sufficient power of memory to recollect the relation in which he stood to others, and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty, he would be responsible.

A man must, therefore, labor under something more than "a

mere moral obliquity of perception," and "a man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints."

The jury must, therefore, even though they believe the prisoner labored under a diseased and unsound state of mind, be satisfied that this diseased or unsound state of mind existed to such a degree, that although he could distinguish between right and wrong, yet with reference to the act in question, his reason, conscience and judgment were so entirely perverted, as to render the commission of the act in question a duty of overwhelming necessity.

But, gentlemen, there is another species of delusion entirely distinct from those which we have just considered, which is recognized by the law, and which, when the jury believe that it clearly exists, will entitle the prisoner to an acquittal. I refer to that delusion by reason of which the prisoner commits the act under a fixed *bona fide* belief (which is a delusion) that certain facts existed which were wholly imaginary, but which if true would have been a good defence.

The judges of England, in their answer to the fourth question propounded to them by the House of Lords, say—supposing that one labors under partial delusion and is not in other respects insane, "We think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes a man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment.

"If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge, he would be liable to punishment."

But, gentlemen, if this spirit of delusion existed, the act charged against the prisoner must be the direct result of this delusion, and the delusion must have been directly connected with the act driving him to its commission, and must have been such a delusion which, if it had been a reality instead of an imagination, would have justified him in taking life.

Besides the kinds of insanity to which I have already referred, and which strictly speaking affect the mind only, we have moral or homicidal insanity, which seems to be *an irresistible inclination to kill or to commit some other particular offence.* We are obliged by the force of authority to say to you, that there is such a disease known to the law as homicidal insanity; what it is, or in what it consists, no lawyer or judge has ever yet been able to explain with precision; physicians, especially those having charge of the insane, gradually, it would seem, come to the conclusion, that all wicked men are mad, and many of the judges have so far fallen into the same error as to render it possible for any man to escape the penalty which the law affixes to crime.

We do not intend to be understood as expressing the opinion that in some instances human beings are not afflicted with a homicidal mania, but we do intend to say that a defence consisting exclusively of this species of insanity, has frequently been made the means by which a notorious offender has escaped punishment. What, then, is that form of disease, denominated homicidal mania, which will excuse one for having committed a murder?

Chief Justice Gibson calls it, "that unseen ligament pressing on the mind, and drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance"—"an irresistible inclination to kill."

If by moral insanity is to be understood only a *disordered* or *perverted* state of the affections or moral powers of the mind, it cannot be too soon discarded as affording any shield from punishment for crime; if it can be truly said that one who indulges in violent emotions, such as remorse, anger, shame, grief, and the like, is afflicted with homicidal insanity, it will be difficult, yes, impossible, to say where sanity ends and insanity begins; for, by way of illustration, the man who is lashed into fury by a fit of *anger* is in one sense insane.

As a general rule it will be found that instances are rare of cases of homicidal insanity occurring wherein the mania is not of a *general nature*, and results in a desire to kill any and every person who

may chance to fall within the range of the maniac's malevolence; as it is general, so also is it based upon *imaginary* and not *real* wrongs; if it is directed against a particular person (as is sometimes the case,) then also the cause of the act will generally be imaginary; when, therefore, the jury find from the evidence that the act has been the result not of an imaginary but *real* wrong, they will take care to examine with great caution into the circumstances of the case, so that with the real wrong, they may not also discover revenge, anger, and kindred emotions of the mind to be the real *motive* which has occasioned the homicidal act.

Orfila has said, "That the mind is always greatly troubled when it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, haunted by terror, or corrupted by an unconquerable desire for vengeance. Then, as is commonly said, a man is no longer master of himself, his reason is affected, his ideas are in disorder, he is *like a madman.* But in all these cases a man does not lose his knowledge of the real relations of things, he may exaggerate his misfortune, but this misfortune is real, and if it carry him to commit a criminal act, this act is perfectly well motived."

The man who has a clear conception of the various relations of life, and the real relations of things, is not often afflicted with insanity of any description. He may become angry, and in a fit of temper kill his enemy, or even his friend, but this is not, and I hope never will be, called in courts of justice insanity. Again, one who is really driven on by an uncontrollable impulse to the commission of a crime, will be able to show its "contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in particular cases, and becoming in itself a second nature," and ought further to show that the mania "was habitual, or that it had evinced itself in more than one instance."

Chief Justice Lewis has said that moral insanity "bears a striking resemblance to *vice;*" and further, "it ought never to be admitted as a defence until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield." And again,

"this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptons indicating its approach."

Gentlemen of the jury, we say to you, as the result of our reflections on this branch of the subject, that if the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will or subjugate his intellect, and was *not* actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal, provided the jury believe that the state of mind now referred to has been proven to have existed, without doubt, and to their satisfaction.

The judge then reviewed at length the evidence, and called the attention of the jury to the act of Assembly regulating the degrees of murder, and also to that act which requires a jury, when the defence is insanity, to say so if they so believe, and also to find if the prisoner is acquitted on that ground; and, after calling upon the jury in the most solemn manner to discharge their whole duty, he committed the prisoner to their charge, saying: "If the prisoner, by reason of mental infirmity, is not a responsible being, acquit him; but if you believe him to be guilty, in that event consign him to that doom which is the direct result of his own act."

The prisoner was acquitted.

In the District Court of the United States, Wisconsin District. In Equity.

THE CLEVELAND INSURANCE COMPANY *vs.* GEORGE REED AND JULIET S. REED HIS WIFE, JAMES H. ROGERS, AND THE MILWAUKEE AND MISSISSIPPI RAILROAD COMPANY.

1. Where a power of attorney is given by three tenants in common of village lots, for the sale, leasing, and absolute disposal of all or any part of their interest in said lots, and the attorney conveys the share of one of the principals, and takes a conveyance back, and then mortgages the same interest for money loaned, all at the same time, the mortgage is, in equity, the mortgage of the principal.

2. A purchaser under decrees of foreclosure of prior mortgages cannot take advantage of the want of power of the attorney; but he can inquire into the true consideration of the mortgage.

3. Usury must be specially pleaded, or specifically set forth on the record, and supported by evidence, or the court will not inquire into it.

4. The statute limiting suits in chancery to ten years, should be applied to a suit to foreclose a mortgage against a purchaser under prior mortgages, brought seventeen years after the mortgage debt was payable, the mortgage given, and the mortgage debt payable before the statute took effect—particularly when the mortgagee had notice within two years after the sale under the prior mortgages, and that the purchaser was in possession of the premises claiming title.

5. Without such a statute, equity would not disturb the possession or title of such a purchaser, as the demand is stale; and there must be conscience, good faith, and reasonable diligence to call into action the powers of a court of equity.

6. *Quere.*—Whether by analogy to the statutes of the State limiting the time for the redemption of lands sold for debt, a subsequent mortgagee, not a party to a bill of a prior mortgagee to foreclose, should maintain a bill in equity to redeem after two years, against a purchaser under a decree on the prior mortgage?

The opinion of the court, in which the facts are sufficiently set forth, was delivered by

MILLER, J.—It is set forth in the bill, that on the tenth day of February, 1837, George Reed made, and delivered to complainant, three promissory notes—one for $7,250, payable in one year; one for $7,500, payable in eighteen months; one for $7,250, payable in two years, with interest after one year—amounting to $22,000. And that said Reed and wife, to secure the payment of said debt, did, at the same time, execute and deliver to complainant a mortgage of certain lots and lands, described as "being twenty acres of land, situate, lying and being in the town and county of Milwaukee and Territory of Wisconsin, equal and undivided, in all those pieces or parcels of land, known as Finch's Addition to the town of Milwaukee, after excepting blocks numbered fifteen (15), sixteen (16), twenty-one (21), and twenty-eight (28); also, lots numbered five (5) and ten (10) in block numbered twenty-nine (29); lot numbered five (5) block numbered thirty-six (36), and lots numbered four (4) and five (5) in block numbered forty-four (44), as designated in the recorded plat of said addition. Said twenty acres subject to

all streets and alleys laid out in said addition, and all legal highways." "And thirty-six acres of land equal and undivided, in those two tracts of land situate in the county of Milwaukee and Territory of Wisconsin, described as lots numbered two (2) and three (3) in section numbered twenty-one (21), in township numbered seven, north of range numbered twenty-two east in said territory, in the district of lands subject to sale at Milwaukee, containing $180\frac{40}{100}$ acres of land."

The mortgage was recorded in the office of the Register of Deeds for Milwaukee county, on the twenty-seventh of April, 1837.

The plat of Finch's addition was vacated by an act of the legislature, approved March 31st, 1855, and the said parcel of land is now known and described as the south-east quarter of section thirty of township seven, range twenty-two east. The complainant claims to have a lien on an undivided twenty acres of said quarter section. And James H. Rogers and the Milwaukee and Mississippi Railroad Company have, or claim, some interest in the mortgaged premises, as subsequent purchasers, incumbrancers, or otherwise, but subject to complainant's lien. A decree of sale of the mortgaged premises is prayed.

The bill was filed and subpœna issued on the twelfth day of February, 1856.

George Reed filed an answer, in which he admits the execution and delivery of the notes and mortgage, he then being justly indebted to complainant in the sum of $22,000. And he admits that the plat of Finch's Addition was vacated by an act of the Legislature; and that the land is now known and designated as the south-east quarter of section thirty of township seven, range twenty-two east. And by virtue of said mortgage, the complainant has a lien on one undivided twenty acres in said quarter section. And he admits that $22,000, the amount of said notes and mortgage, with interest, still remains due and unpaid. He pleads that, in the month of December, 1842, he was discharged from his debts, under the bankrupt law of the United States, by the Supreme Court of the Territory of Wisconsin.

James H. Rogers, in his answer, states that George Reed never

had any business transactions with complainant, except through one Edmund Clark, who, at the date of the mortgage and ever since, was the president of the corporation. He says that he is the owner in fee simple of the south-east quarter of section 30, of town. 7, range 22; and that he has been in the full and actual possession, as the owner thereof, for the last nineteen years, and fenced and cultivated it. And he has resided in Milwaukee constantly, where he could at all times be found. He pleads that he has been in the actual occupation of the land for more than ten years since the right of action on the mortgage accrued, and before the commencement of this suit; and that the right of action is barred by the statute of limitations of this State, the right of action having accrued more than ten years before the bill was filed.

Rogers further answers, that neither George Reed nor the complainant ever had any title to, or any equitable or just claim to, or lien on said mortgaged premises. That the twenty acres were the property of Curtis Reed. And Edmund Clark was the president of the insurance company, and the owner of the controlling interest in its capital stock. George Reed, as the attorney in fact of Curtis Reed, conveyed said twenty acres undivided to Clark, by a deed bearing date the same day of the mortgage, for the pretended, or nominal consideration of $20,000. And on the same day and time, at Cleveland, Ohio, Clark conveyed the same to George Reed, for the pretended, or nominal consideration of $30,000, who gave to the insurance company the notes and mortgage. These conveyances and mortgage were given in the absence of Curtis Reed, and without his knowledge or consent; and they are all parts of one corrupt and fraudulent transaction, and without any benefit to Curtis Reed;—and that it was a fraud upon Curtis Reed and those claiming, under him, any interest in the land.

Rogers also sets forth in his answer, that Curtis Reed, prior to the execution of the mortgage, gave a mortgage of the land to Nathaniel Finch, for $2,000 and interest; and another mortgage upon his remaining interest of the quarter of section thirty, to B. W. Finch, for $2,266; and both these mortgages were recorded before the mortgage of complainant. Those two mortgages were

assigned to the defendant Rogers, for a valuable consideration, before due, who caused them to be foreclosed by two suits in the Territorial District Court for Milwaukee County. And the land was sold to him, (Rogers) and the sales were confirmed and deeds made.

Rogers further sets up title to the land under a sale by the assignee of George Reed, of his interest in the land.

And he pleads that the conveyances and mortgage were a device to avoid the laws of usury; and that the notes and mortgage are void, as being in violation of the laws of Ohio, or New York, or Wisconsin.

He also claims title by means of sundry tax deeds; and, also, that he has paid the taxes.

He insists that the cause of action is stale, and should not be enforced in equity. He also insists that it is nowhere stated in the bill, that the money as claimed to have been loaned, was part of the capital of the insurance company. And that the charter of the company gives no power to deal in real estate, or to loan money except of the corporate funds. And that the mortgage for that reason is void. And that the company has long since ceased to exist, and is incapable of bringing this suit.

Defendant Rogers disclaims any interest in lots 2 and 3 of section 21, town. 7, range 22, described in the mortgage and bill.

A replication is filed to the answer of James H. Rogers.

The Milwaukee and Mississippi Railroad Company makes no defence.

By the deed of Benoni W. Finch and wife, to Curtis Reed, dated April 23d, 1836, fifteen acres undivided, and also five acres undivided in section 30, town. 7, range 22, were conveyed. And by the deed of Nathaniel Finch and wife, to Curtis Reed, dated April 26th, 1836, seventeen and a half acres undivided in the same section were conveyed.

On the 23d June, 1836, B. W. Finch and wife, and N. Finch and wife, and Curtis Reed, gave to George Reed a power of attorney "to contract for the sale, leasing, and absolute disposal of all or any part of our interest in the village lots laid out in the south-east

quarter of section No. 30, in township 7, range 22, in the Territory of Wisconsin, known and designated as Finch's addition; and on such terms as to our said attorney shall seem meet. And also absolutely to sell, convey, or lease, and in our names and behalf to execute all deeds or instruments that may be necessary to carry into full effect the powers hereby conferred; and enable our said attorney to make such disposition of all or any part of our interests in the premises above described, as effectually as we ourselves might do, excepting and reserving unto ourselves, respectively, the sole right of selling the several lots and blocks therein described. And the said attorney is to retain five *per cent.* on the amount of rates which he shall effect, and his expenses to be refunded."

Instead of making sales and leases of lots as contemplated, George Reed, as the attorney of Curtis Reed, under the power, on the 10th February, 1837, in Cleveland, Ohio, conveyed by warranty deed to Edmund Clark, "twenty acres of land undivided of that tract known as Finch's addition to the town of Milwaukee, excepting the lots and blocks excepted in the power of attorney, and as designated in the recorded plat of said addition, and subject to all streets and alleys laid out in said addition, and also subject to all legal highways." And on the same day and at the same place, Edmund Clark conveyed by quit claim deed, the same land with the same description to George Reed, who, with his wife, gave back the mortgage in suit and the notes, to the Cleveland Insurance Company.

Edmund Clark has been examined as a witness, and he testified that these several conveyances and the notes and the mortgage were executed and delivered at the same time, and were the same transaction. It is certain George Reed could not use the power of attorney so as to acquire title to the land adverse to or exclusive of that of his principal, Custis Reed. In equity it is Custis Reed's mortgage, although at law it is George Reed's personal obligation or contract.

Clark testifies that he thinks the mortgage was to be on the same twenty acres that were conveyed to him. The description in the deeds and mortgage, in connection with the power of attorney, and its recital in the deed to Clark, confine the mortgage to Curtis Reed's

twenty acres. This mortgage does not cover any interest of George Reed in that section, which he then held. Everything connected with the transaction excludes the idea that the mortgage is upon any land in that section but Curtis Reed's. The purchase by Rogers of George Reed's interest in the section of land at his assignee's sale, does not affect this mortgage. George Reed's bankruptcy, and the proceedings and the sale under them, have nothing whatever to do with this case, so far as James H. Rogers is concerned. The return of this debt by George Reed, in the schedule annexed to his petition in bankruptcy, cannot in any way affect the interests or rights of Curtis Reed and James H. Rogers in regard to the mortgage or the mortgaged premises.

This mortgage was a security for money loaned, and the insurance company had authority by its charter to take security for money loaned as part of its capital.

Clark testifies, that the amount paid Reed was entered on the books of the company, as paid by it. That he made the arrangement with Reed after consulting some of the directors. He also testifies that eleven thousand dollars, part in cash and part in paper, was the true sum advanced, and was the true consideration. The other eleven thousand was the consideration of a guarantee that the mortgaged premises would be worth the amount, when the notes should become payable; and also a private note of $3,000 was given by Reed as a penalty for the punctual payment of the notes. The notes were given in Ohio, and were made payable in New York, and the mortgage is on land in Wisconsin. The pleadings do not authorize the court to inquire into the subject of usury. They are altogether too indefinite and uncertain. Usury must be specially pleaded, and the evidence must sustain the plea. The whole transaction appears to have been a desperate device of George Reed to make a raise of money, and an unwarrantable scheme of Clark to embarrass a customer. Rogers pleads in his answer, that the transaction was a violation of the usury laws of either the States of Ohio, New York or Wisconsin, and is void. Upon such pleading I shall not examine the subject; nor shall I stop to inquire whether Rogers could plead usury without tendering the amount actually loaned, with interest.

A power to sell lands, usually includes a power to mortgage; but a mortgage under such a power for a greater sum than is actually loaned, may be repudiated by the principal. Curtis Reed might have required the cancellation of the conveyances and mortgage, at all events, upon payment of the sum loaned. But Rogers is a stranger to the transaction, and he cannot make the objection to the validity of the mortgage. He can only cause inquiry to be made of its true consideration, if it is a lien on his land. *Jackson ex dem McCarty* vs. *Van Dolfsen*, 5 Johns. 43; *Childs* vs. *Digby*, 12 Harris, 23.

Rogers became the assignee of the two mortgages of Curtis Reed to the Finches, dated in April, 1836. In pursuance of decrees of the District Court for Milwaukee county, at the suit of Rogers against Curtis Reed, Edmund Clark and others, the mortgaged premises were sold in satisfaction of those mortgages to Rogers: a deed was made to him of the premises, by the master, according to the order of confirmation of the sales. Those mortgages being prior liens, Rogers became the purchaser of the legal title. The mortgage in suit is dated in February, 1837, and is of Curtis Reed's equity of redemption merely. An ejectment would not lie, at the suit of this mortgagee against Rogers, the owner of the legal title. The only remedy of the complainant is by bill in equity for the sale of the mortgaged premises, which is this bill, or for redemption; and the subject matter is of the peculiar and exclusive jurisdiction of a court of equity.

At the date of this mortgage there was no statute limiting suits in equity. An act went into force in the month of July, 1839, that "Bills for relief in case of the existence of a trust not cognizable in the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." This limitation was continued in the State statutes of 1849, and is now in full force. This mortgage is dated Feb. 10, 1837. The first note is payable in twelve months, the second in eighteen months, and the third in two years. When the act of limitations went into force, the cause of action had accrued. This court will administer statutes of limitation of the State, as

rules of property. I shall proceed to inquire whether the statute is applicable to this case.

This case is one of the "cases not provided for" in the statute. If the word *hereafter* had been inserted in the statute (as in similar laws of some of the States), so that it would read "hereafter accrue," the question would be relieved of doubt. The statute seems to direct the attention to such causes of action as shall accrue, and not to those that had then accrued. The Supreme Court of this State have applied this statute to causes of action accrued at the time of its enactment. *Fullerton* vs. *Spring*, 3 Wis. R. 667; *Parker* vs. *Kane*, 4 id. 1. This statute was copied from the statute of the State of New York. In that State a contrary application of the statute was made in *Williamson* vs. *Ford*, 2 Sandford Ch. Rep. 534, 570, and cases cited. In those cases the general rule is announced, that no statute is to have a retrospect beyond the time of its commencement, and to affect vested rights unless expressly so declared. But in the subsequent case of *Sparr* vs. *Mills*, 3 Barbour's Ch. Rep. 199, it is decided that an equitable claim, upon which a bill in chancery could have been filed, previous to the time when the statute first took effect, and when the complainant was under no legal disability, is barred by the provisions of the statute at the expiration of ten years after the statute went into operation. The statute of the State of Massachusetts, in its general provisions as to claims that shall accrue, is the same as the statutes of New York and of Wisconsin; and a similar application is there made. *Smith* vs. *Morrison*, 22 Pick. Rep. 430. *Sedgewick on Statute of Lim.* 691. The legislature of the State of Mississippi passed an act, in the month of February, 1844, that judgments rendered before the passage of the act, in any other State of the Union, should be barred, unless suit was brought thereon within two years after the passage of the act. In the case of the *Bank of Alabama* vs. *Dalton*, 9 Howard, 522, it is decided by the Supreme Court of the United States that, the act could be pleaded in bar to an action on a judgment rendered in the State of Alabama one year previous to its passage, and that the Constitution of the United States did not prohibit that legislation as a law impairing the obligation of con-

tracts. The time and manner of the operation of statutes of limitations generally depend on the sound discretion of the legislature. Cases, though, may occur, when the provisions of a law may be so unreasonable, as to amount to a denial of right, and call for the interposition of the court. A statute of limitations affects the remedy, not the contract, where a reasonable time is given for bringing suit on existing demands. See also on this subject the opinions of the court in *Jackson* vs. *Lamphire*, 3 Peters, 289; *Sturgis* vs. *Crowninshield*, 4 Wheat. 206; *Bronson* vs. *Kinzie*, 1 Howard, 311; *McCracken* vs. *Haywood*, 2 id. 608; *Lewis* vs. *Lewis*, 7 id. 776; *McElmoyle* vs. *Cohen*, 13 Peters, 312; *Call* vs. *Hagger*, 8 Mass. Rep. 429; *Holyoke* vs. *Haskins*, 5 Pick. 26; *Smith* vs. *Morison*, 22 id. 431; *Morse* vs. *Gould*, 1 Kernan, 281. In *Ross & King* vs. *Duval*, 13 Peters, 45, the court remark:—"It is a sound principle that, when a statute of limitation prescribes the time within which suits shall be brought or an act done, and part of the time has elapsed, effect may be given to the act; and time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." From a careful examination of the case of *Murray* vs. *Gibson*, 15 Howard, 421, it will appear that that decision does not conflict with the previous decisions of the court. The act of the State of Mississippi, passed in March, 1846, as an amendment to the limitation law of the State, provided that, "no record of any judgment recovered in any court of record without the limits of the State, against any person who was, at the time of the commencement of the suit, on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this State, shall be received as evidence to charge such citizen, after the expiration of three years from the time of the rendition of such judgment without the limits of this State." The declaration was in debt, on a judgment rendered in the State of Louisiana in the month of November, 1844. By the literal terms of the act, the rights of a judgment creditor seem to be made dependent, not on his diligence in the institution or prosecution of his suit, but upon the trial of the action on his judgment, which is an event over which he can have no control. The peculiar

language of the act, if taken in its literal acceptation, might suggest a serious doubt as to the compatibility of its provision, with the principles of common right, or with the federal constitution. For these reasons the courts construed the law to relate to the time of bringing the suit and not to the time of offering the record in evidence at the trial; and also confined its operation to judgments rendered in other States after its date. In addition to these reasons the law of the same State as then existing, and on which the case of the *Bank of Alabama* vs. *Dalton*, was ruled, was applicable to the case of *Murray* vs. *Gibson*, and would have barred it if pleaded. The court applied the law to judgments rendered after its date, to prevent the injustice intended by the legislature, of excluding judgment records at the trial. The court remark—"That laws should be so construed as not to allow a retroactive operation, where this is not required by express command, or by necessary, or unavoidable implication. Especially should this rule of interpretation prevail, when the effect and operation are designed, apart from the intrinsic merits of the rights of parties, to restrict the operation of those rights."

This bill was filed nineteen years after the date of the mortgage; seventeen years after the whole cause of action had accrued; and sixteen years and five months after the statute of limitations went into force. The complainant was under no legal disability, and might have brought suit before the ten years prescribed by the law had expired. I am of the opinion that this case should be considered as barred by the statute; but it is not essential to the proper disposition of the case, that the bill be dismissed on this ground.

In the year 1840 the sales to Rogers, in foreclosure of the Finch mortgages, were confirmed, and deeds were executed and delivered, when he went into possession. Clark testifies that, "I think I first began to look after this real estate in 1841 or '42. We got a man, who was going up there, to look into it, and he came back with rather a poor story. I first learned that James H. Rogers was in possession of the property ten years ago, perhaps more. I wrote to some gentlemen in Milwaukee, and they wrote me that Rogers was in possession, claiming title. The information which John W. Allen

gave us, who we requested to look after our interests in Milwaukee, and who went there, was, that the thirty-six acres embraced in the mortgage had been foreclosed and sold on a previous mortgage, and that the twenty acres in Finch's addition embraced in the same mortgage, had been sold at several tax sales, and that it was not then valued at over ten dollars per acre. This statement was made in 1841 or 1842. This Mr. Allen was the first President and a stockholder in the Cleveland Insurance Company." Rogers has continued in actual possession, and has paid the taxes mostly by suffering the property to be sold, and then taking deeds, and has made valuable improvements. The property has become very valuable, not from any labor, expenditure or exertion of the complainant. It is the policy of this new State that titles should be quieted. The growth and improvement of the State requiring this policy, the legislature have wisely limited the time for bringing ejectments to ten years. Clark, the controlling officer of the Insurance company, had notice, by his agent, and a stockholder of the company, that Rogers was in possession fifteen years before this bill was filed. From these facts, this bill should not be maintained against Rogers at this late day. From the delay in bringing suit, after the notice that Rogers was in possession, claiming title to the land not considered worth the costs of a suit, the demand may be considered as abandoned or stale. In this respect this case somewhat resembles the case of *McKnight* vs. *Taylor*, 1 Howard, 161; in which it was remarked by the Court—"In relation to this claim, it appears that nineteen years and three months were suffered to elapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned, in any degree, by obstacles thrown in the way of the appellant. If, indeed, this suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debt would have been presumed to be paid. But we do not found our judgment upon the presumption of payment; for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid

to stale demands. There must be conscience, good faith and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy; and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of the court in the case of *Piatt* v. *Vattier*, 9 Peters, 416; and that nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence; and when these are wanting, the court is passive and does nothing, and therefore, from the beginning of equity jurisdiction there was always a limitation of suits in that court." The demand is not to be favored, even for the amount actually loaned, on account of the circumstances attending the negotiation, and for the reason of the delay in either redeeming the land from Rogers, or instituting proceedings for such redemption. In this case, on the part of the complainant, there is a want of conscience, of good faith, and of reasonable diligence; and upon the principle and spirit of the statute of limitations, and also of the policy of the country, this claim should not, at this late day, be enforced in a court of equity, against Rogers.

This suit was sought to be maintained on the ground that the equity of redemption of the Cleveland Insurance Company was not barred by the foreclosure of the Finch mortgages, as it was not made a party defendant on the record of these cases. If this complainant had been nominally made a defendant in those cases, there would be no doubt of its foreclosure by those decrees, of all equity of redemption as a subsequent mortgagee, even if the proceeding had been against it, by a newspaper publication of a rule to appear and plead, answer or demur, according to the statute. Why Edmund Clark was made a defendant, and the Cleveland Insurance Company was omitted, cannot be accounted for, unless from the nature of the several conveyances and the active agency of Clark in the negotiation, it was supposed that the mortgage was taken nominally in the name of the company for his use. In the whole business the name

of the company only appears as payee of the notes and as mortgagee. The business was transacted by Clark, without authority from the directors of the company, by a vote of the corporate body. There is no pretence that the directors entered on the minutes or records of the corporation any resolution or order authorizing Clark to consummate the negotiation by those deeds to and from himself, and to take the mortgage in the name of the company for double the sum actually loaned. Clark swears "that he did not know whether it was the funds of the company or his own funds that were advanced to Reed, and also, that if the company would not advance the money he would." From a subsequent examination of the books of the company and of memoranda, it may be inferred that the money advanced was the funds of the corporation. Be this as it may, Clark was the President of the company, the owner of the principal part of the stock, and the business man of the company. Under these circumstances, it was quite convenient for him to take a mortgage in the name of the corporation to secure a debt of his own, particularly in such an unconscientious transaction. He had the controlling power in the company. If he consulted the directors, it was but mere matter of form. He was the company for all business purposes, and he testifies that he and the company had notice by their agent one or two years after the sale to Rogers, that Mr. Rogers was in possession of the mortgaged premises claiming title. If Rogers was claiming title, either by virtue of his purchase under the decrees of foreclosure of the Finch mortgages, or by purchase at sales for taxes, it was the duty of the Cleveland Insurance Company, by its officers or agents, upon the receipt of the notice, to have redeemed the land from those sales. They at the same time had notice that the land was not considered worth over ten dollars per acre, which would not warrant the expenses and disbursements required for redemption. Under these circumstances it would not be equitable or just to decree, at this late day, after the land has become valuable, that Rogers' title and possession should be disturbed, for the mere omission of the Cleveland Insurance Company as a nominal defendant in the bills and proceedings to foreclose prior mortgages.

If the Finch mortgages had been foreclosed by a newspaper advertisement and sale, in pursuance of authority in the mortgages, the Cleveland Insurance Company would have been entitled by law to redeem within two years. By the law then in force, the mortgagor had two years time to redeem from such sale; and "any person to whom a subsequent mortgage may have been executed, shall be entitled to the same privilege of redemption to the mortgaged premises, that the mortgagee might have had, or of satisfying the prior mortgage; and shall by such satisfaction acquire all the benefits to which such prior mortgage was or might be entitled." And the law directs that if the mortgaged premises so sold shall not be redeemed, the officer making such sale shall make a deed to the purchaser. And if there is an overplus of purchase money on hand, it shall be retained for subsequent incumbrances.

In the proceedings in court to foreclose the Finch mortgages, Clark, as a non-resident not served with process, was entitled by law to three years' time to come in and petition the court to open the decree as to him, for the use of the insurance company. But by the law, if such application be not made, the decree shall be adjudged to be confirmed, which confirmation shall have relation to the time of making the decree. And by law, land sold under execution was redeemable by the owner within two years after the sale; and a creditor by judgment or decree could acquire the interests of the purchaser within three months after. These several laws are rules of property, strictly observed as to time in all cases; and they are also laws of limitation. They fully demonstrate the policy of the State in regard to sales of land for the payment of debts. In the absence of laws limiting suits and proceedings in equity, the laws of limitation as to similar demands in courts of law, are considered as rules proper to be observed in courts of chancery. From analogy to these laws, it is questionable whether a subsequent mortgagee, not named as a party in a bill to foreclose a prior mortgage, shall be allowed to redeem after two years. I am aware that the opinion prevails, that such redemption cannot be denied, as the person claiming it was no party to the proceedings in court. The opinions of some courts favor this idea. But in several of the States a proceeding in court, and a decree against the prior mort-

gagor and *terre tenant*, are sufficient to bar all subsequent incumbrances. The proceedings in court are open; the advertisement and sale are supposed to be known to all persons interested, who should attend the sale and bid up the property to cover their liens. Every person is expected to look after his mortgages and liens, within a reasonable time. But whether a subsequent mortgagee should be limited in equity to redeem within two years, by analogy to the statute referred to, I need not now determine. But that he should redeem within a reasonable time, there is no doubt. The company, through its officers and agents, had notice of Rogers' possession under claim of title within two years after his purchase at the master's sale in the foreclosure of the Finch mortgages. Inquiry should then have been made into his right to possession and claim of title; and the land should have been redeemed from the sale within the two years, or a reasonable time after. The complainant was under no disability to proceed on its mortgage, nor has Rogers done any act to delay or prevent a redemption or sale of the land. The complainant has done no act to enhance the value of the land, while Rogers has. The complainant cannot be allowed to profit by the delay, at Rogers' expense. For these reasons the court will not order a decree on this bill, that would disturb the possession or title of Rogers; or require him to pay the sum, with interest, advanced to George Reed.

James H. Rogers disclaims title to, or interest in lots two and three in section twenty-one, or in any undivided interest in those lots; consequently there is no decree to be ordered against him as to them. George Reed was discharged from his debt under the late bankrupt law; and he is thereby released from all personal responsibility or liability on the notes and mortgage. The Milwaukee and Mississippi Railroad Company, I presume, was made a defendant, for its claiming the right of way through section thirty. There are no parties, then, that a decree could be made against, in regard to the thirty-six acres in section twenty-one. But if that land was sold under a decree in the case of Increase A. Lapham, as set forth in Rogers' answer, I presume the complainant has no claim of lien against it. If so, the bill will be dismissed as to both tracts. Bill dismissed.

In the District Court of the United States for Maryland. March Term, 1858.

BENJAMIN HANEY, CHARLES OGDEN AND JOHN TRENCHARD, OWNERS OF THE SCHOONER WM. K. PERRIN *vs.* THE STEAMER LOUISIANA AND GEORGE W. RUSSELL, HER CAPTAIN.

1. Where a steamboat and sail vessel are approaching each other, and a collision takes place between them, if there is mutual fault, the loss that is occasioned must be divided.

2. A steamboat in the night time navigating the waters of a bay or river, must always have a look-out, who, for the time, has no other duty or occupation.

3. The rules of navigation, as settled in *St. John* vs. *Paine*, 10 How. 583; *The Genesee Chief*, 12 How. 461, and *The Oregon* vs. *Roceo*, re-affirmed and acted upon.

The opinion of the court was delivered by

GILES, J.—The libel in this case was filed to recover the value of the schooner Wm. K. Perrin, her cargo of oysters, and personal property on board, consisting of schooner's furniture, master's clothing, &c., amounting in all to between four and five thousand dollars. The schooner was sunk, with every thing on board, on the night of the 20th February last, in the Chesapeake Bay, in consequence of a collision with the steamer Louisiana.

The libellants, in their said libel, state that the collision occurred in the following manner:

"That on Saturday, the 20th February, 1858, the said schooner sailed from Drum Point Harbor, in the Patuxent river; and between nine and ten o'clock that evening, while making her course down the Chesapeake Bay, about five miles below the Rappahannock light boat, she was run into by the steamer Louisiana, whose master the said George W. Russell then was; and that said schooner was so much injured that she sunk in three minutes, in deep water, and

before any property could be saved from the vessel; and that the said collision was the result of no want of care, negligence, seamanship, prudence or precaution on the part of the said master or crew of the said schooner, but resulted altogether from the negligence, default, misconduct and wrong of the master and crew of the said steamer."

And they proved, by the depositions of Isaac Matthews and Daniel B. Burrows, that the said schooner was two years old, and was worth at the least $3,000; and that she would carry 200,000 oysters: 150,000 prime and 50,000 cullings. That the prime were worth $7 per thousand, and the cullings $3 per thousand; or by the bushel the oysters were worth $1 per bushel. And by the testimony of Kelly and Coney, that she carred 1,200 bushels; and Coney also proved that her owners were to have one-third of the gross value of her cargo, and the remaining two-thirds, after deducting expenses, were to be divided as follows: one-third to the captain (Ogden), one-third to the mate, and one-third to himself.

They also proved by William Miles, that he was mate on board the "Wm. K. Perrin," at the time of the collision, and had hold of the tiller at the time; that he was steering a due south course; that when he first saw the steamer she bore from the schooner south half east, on the larboard bow; when the steamer came quite near, he discovered that she was going more to the west, and would come bows on to the schooner if some change of the course of the schooner was not made; that he immediately shoved his helm down, and called out to the men in the cabin to turn out; that the captain jumped up and got on the helm with him, but that within two seconds from the time he shoved his helm down, the steamer struck her, two feet aft the main rigging, and fifteen feet from the stern on the larboard quarter; and the schooner sunk immediately, hardly giving them time to save their lives by getting on board the steamer. That the schooner was going at the time about six knots per hour, and that Charles Corey was the only boy or person on deck with him at the time, and he was forward. That he believed if he had held on his course, and not ported his helm, the steamer would have struck the schooner bows on.

They also proved by Charles Corey, that he was forward, on the larboard side of the said schooner, and when he saw the steamer she was about three-fourths of a mile distant, and to the leeward of them; thinks if they had held on their course the steamer would have run into them bows on, but that they might have cleared the steamer by putting up the schooner's helm; and that he called out to Miles to do so, but received from him no answer.

Burrows, in his deposition, testified, that when he first saw the steamer from his vessel, she was four and a half miles ahead, and bore one point to leeward of his course; and at that time the schooner "Wm. K. Perrin" was about three-fourths of his (witness') schooner, and bore about a south-east course from it, and was distant from the steamer about three miles and a half.

The claimants, in their answer, allege, that on the night of the collision, the steamer Louisiana, being on her regular trip up the Chesapeake Bay, from Norfolk, in Virginia, to Baltimore, heading due north, discried said schooner at the distance of seven miles, standing down the bay, and holding a course nearly due south; at that time the schooner bore about two points to the east of north from the starboard bow of the steamer. It was the captain's watch on board the steamer; and the second mate, a skillful officer, was running the steamer, and was at his proper place in the wheel-house, a position from which he had a full and perfect view ahead, and on both sides of the steamer. That Captain Russell was on the look-out, and several other persons were at the time on the deck of the steamer; and it was certain, from the course of the two vessels, that they would pass in safety at the distance of several hundred yards, if no change was made in the course of either vessel. That there was a pretty stiff breeze blowing at the time from N. N. West, so that the schooner had a free and fair wind.

That when the schooner was within a hundred yards or thereabouts of being on a parallel line with the steamer, the schooner put her helm down, which turned the head of the schooner towards the western shore, and ran the schooner across the steamer's bows. The instant this unexpected movement was perceived, the wheel of the steamer was rapidly plied, so as to cause the steamer, as far as

possible, to head towards the west, and at the same instant, orders were given to stop, and back the steamer. Both of which orders were promptly obeyed, but it was then impossible to prevent a collision. And that such a collision was the inevitable result of the change of the schooner's course.

And the claimants proved by A. T. Ward, that he was the second mate and pilot of the steamer, and was on board, and in the pilot-house on the night of the collision; and a black man was at the wheel; the captain was on the deck. That he saw the schooner three or four miles off, and that she was then half point on the starboard bow of the steamer. When she got within 200 yards of the steamer she bore north by east on his starboard bow. In order to give plenty of room, he put the steamer's helm a-starboard, and held a course north by west. After he had done this, he discovered that the schooner had altered her course to the west, and was steering across the steamer's bows. That he then rang the gong and signaled the engineer to stop the steamer, and hove his wheel a-starboard to endeavor to come alongside of the schooner. That if the schooner had held on her course she would have passed two hundred yards to the east of the steamer. And that the schooner when she changed her course was about one hundred yards from the steamer. And by Mr. Rice, that he was on board the steamer on the night of the collision, and came on deck after the gong sounded, and that the schooner was then about seventy-five yards from the steamer, and was standing to the west, and seemed to be wavering in her course, as though no one was at the helm; and that the collision took place almost immediately afterwards.

I have thus given a brief outline of the allegations and testimony on either side; and as it frequently occurs in collision cases, there is a conflict as to the most important points in the case. But I am left without the advice and information of experienced nautical men to ascertain who was in fault on this occasion. This information from old and experienced ship-masters is always within the reach of the judges in the high court of admiralty in England, and who sit in that court as the *Trinity Masters*. But in determining this question, I have to guide me, rules of navigation which have been recognized through-

out the commercial world, and have been sanctioned and adopted by the Supreme Court. The first, and one of the most important of these rules of navigation (in reference to the large increase of vessels propelled by steam) is, that "when meeting a sailing vessel, whether close hauled or with the wind free, the latter has a right to keep her course; and it is the duty of the steamer to adopt such precaution as will avoid her." See *St. John* vs. *Paine* and others, 10 How. 583. And that although just before a collision the master of a sailing vessel may have given an order or executed a change in the course of his vessel which was not judicious, yet this does not excuse the steamer, because it had the power to have passed at a safer distance, and had no right to place a sailing vessel in such jeopardy that the error of a moment might cause her destruction. See the case of the *Genesee Chief*, 12 How. 461. Another of these rules is, that when two vessels, either steam or sailing vessels, are approaching each other on parallel lines, or nearly parallel, in opposite tacks, each vessel must, if there be danger of a collision, put their helms to port, and pass on the *larboard side of each other;* and that this rule prevails when a steamer is meeting a sailing vessel in all cases, except where the sailing vessel is so far on the starboard bow of the steamer that its observance would, instead of avoiding, tend to bring about a collision, by causing the steamer to cross the bows of the sailing vessel. See the case of the Rose, 2 W. Robertson, 4. *Wheeler* vs. *Steamer Eastern State*, 2 Curtis, 144. *Steamer Oregon* vs. *Rocco and others*, 18 How. 572. *St. John* vs. *Paine*, 10 How. 584.

Now, in this case it is by no means clear, from the evidence, that if the schooner's course had not been changed a few seconds before the collision, that it would not have taken place. I think, therefore, that the steamer was wrong, when she had such wide waters around her, in running so close to the schooner, that if she had not changed her course, the steamer must have passed within a hundred yards of her, if not over her, as two of the witnesses believed.

I think the steamer was also wrong in attempting to pass to the west, or on the starboard side of the schooner; for, although it may be as the pilot, Ward, testified, that the schooner was half or one

point on the starboard bow of the steamer, yet the steamer should have ported her helm and passed on the larboard side of the schooner. For, if this rule of navigation be strictly enforced and generally acted on, every vessel can govern itself accordingly when approaching another, and many disastrous collisions may be avoided. I think also, there was gross want of skill and proper caution on the part of Miles, who was at the helm of the schooner at the time of the collision. According to his own testimony he saw the steamer was *westing on him*, (to use his own language) and knew that her speed was more than double that of the schooner, and when within one hundred yards of the steamer he attempted to go to the west of her, instead of putting his helm up and going to the east, which according to Corey's testimony should have been done, and would have avoided the collision; and this, too, after Corey, who was on the look-out on the schooner, had called to him to put his helm up. This, then, makes a case of mutual fault, and I shall decide the loss as the Supreme Court did in the case of the *Schooner Catharine* vs. *Dickerson*, 17 How. 176, *Rogers and others* vs. *Steamer St. Charles*, 19 How. 108.

Before passing from this case, I would remark that if this collision had occurred without the schooner having been seen by persons on board the steamer until it was too late to avoid it, it would have been my duty to have decided the case against the steamer, without inquiring into any other circumstance of the collision. And for the reason, that on the night in question, the steamer *had no proper look-out;* for the pilot, Ward, testified that he was on the *look-out.* And the Supreme Court have again and again decided *that a look-out must be one exclusively employed in watching the movements of vessels which they are meeting, or about to pass; and must have for the time no other occupation or duty.* See 12 How. 462; 10 How. 585, and 18 How. 225. I am surprised that this steamer, that has been so well managed in all that pertains to the comfort and convenience of her passengers, and has gained so large a share of the public confidence, should be found running on this occasion without such a look-out on deck.

New Jersey Court of Appeals—March Term, 1858.

THE MORRIS CANAL AND BANKING COMPANY, APPELLANTS *vs.* GEORGE T. LEWIS, RESPONDENT.

1. Railroad or canal bonds, with coupons, deposited as collaterals for the payment of promissory notes, may be sold, if the notes are not paid at maturity, the presumption being that such was the intention of the parties.

2. Without a special agreement to that effect, ordinary bonds and mortgages, or promissory notes, deposited as collaterals, cannot be sold to raise the money.

The bill in this case was filed in the Court of Chancery of New Jersey, by the respondent, who held several coupon bonds of the Morris Canal and Banking Company, which were due, to obtain a decree for their payment. The chancellor made his decree, ordering the revenue of the company to be sequestered until the money is paid; whereupon the company appealed.

The unanimous opinion of the court was delivered by

ELMER, J.—It was held by this court in the case of *The Morris Canal and Banking Company* vs. *Fisher*, 1 Stock. 667 & 3 Am. L. Reg. 423, that the coupon bonds of the company are transferable by delivery, so that a bona fide holder has a good title to them; and this principle has since been recognized as correct by other courts. It rests upon the facts that such bonds are expressly designed to be thus circulated, and to be sold in the stock market like public securities; and that they are universally so used. When bonds of such a character, having several years to run before they become due, are deposited as collateral security for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold, after demand and due notice, like goods and chattels, stocks and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, or like choses in action, which, in the absence of an agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed it was the intention of the

parties thus to deal with them. The reasoning of the judge in the case of *Wheeler* vs. *Newbold*, 5 Duer, 29, goes to this extent, although the case itself decides only that a sale of pledged property, to be valid, must be public, and be preceded by a demand of payment, and a reasonable notice of the time and place of sale.

The bonds now in question, were deposited by the appellants as collaterals, for the payment of two notes of theirs given to J. P. Morris & Co. Besides the presumption arising from the nature of the deposits, the correspondence between these parties, we think, establishes beyond all reasonable doubt, that they expected them to be sold to raise the money, if the notes were not paid when they became due. (Here follow extracts from the correspondence, ending with a formal notice of the time and place of sale, to which there was no reply.)

Whatever may have been the president's personal views, or the real intentions of the board of directors, the correspondence will admit of but one meaning. Morris & Co. and the respondent, to whom it appears it was shown, must have understood them as intimating that they had no objection to make to the proposed sale. To permit them now to complain that they did not so intend, would be to permit them to take advantage of their own silence when they were bound to speak. In Batten on Specific Performance 88, (7 Law Lib. 69) the author states the principle to be deduced from the authorities in equity to be: "when a person has tacitly encouraged the act being done, or has consented to it, he shall not exercise his legal right in opposition to that consent." Upon this just principle, if it was admitted that when the bonds were deposited it was not intended that they should be sold, the company would be estopped by the correspondence from withdrawing their consent, after the sale had taken place.

Robert Adams, to whom the bonds were publicly bid off and sold, transferred his bid on the next day to Morris & Co., who thus became the absolute owners of them, and credited the amount they produced on the notes held by them. There is no proof that Adams purchased them for Morris & Co., or otherwise than in a fair and bona fide manner. It is therefore not necessary to determine

whether Morris & Co. had a right to purchase at the sale made by their own order and for their own benefit. The title of Adams, although not so perfected as to enable him to take possession of the bonds until he paid for them, was the title of a bona fide purchaser, which he had a right to transfer to any subsequent purchaser, who thus took his place as a bona fide holder. It does not distinctly appear of whom the respondent purchased the bonds; but as it does appear that Morris & Co. had acquired a perfect title to them, it is no defence if he purchased of them, and if, as was insisted, he was notified before he did so, that the company objected to the sale. The decree of the chancellor must be affirmed, with costs.

In the Supreme Court of Pennsylvania.

ROGERS ET AL. *vs.* GILLINGER ET AL.

The fragments of a building blown down by a tempest are not thereby converted into personalty, but pass to the purchaser of the realty at sheriff's sale.

This case came up on a writ of error to the Common Pleas of Bucks county.

The opinion of the court was delivered by

STRONG, J.—The owner of a lot of ground, upon which had been erected a large frame building, conveyed the property to assignees in trust for the benefit of creditors. Prior to the assignment, a judgment had been recovered against the assignor, which was a lien upon the real estate conveyed. Two days after the assignment had been made, a storm of wind demolished the building, leaving the foundation and walls nearly entire, but breaking the superstruction so that its materials could not be replaced, or used in the construction of a similar building. While in this condition the whole was levied upon and sold under executions founded upon the judgment against the assignor, and the voluntary assignees now claim that the ruins of the frame building did not pass at the sheriff's sale, that

they were personal property, and that the purchaser under the venditioni exponas, having used them, is responsible to the assignees in an action of trover.

It may be premised that the assignees stand precisely in the shoes of Beek, the first owner. If he could not assert against the purchaser at sheriff's sale, supposing no assignment had been made, that the fragments of the building were personalty, neither can they. It may also be remarked that the purchaser under the judgment has obtained all upon which the judgment was a lien.

Now, clearly, Beek, the first owner, could not have torn down the building, and converted the materials from realty into personalty, without diminishing the security of the judgment, impairing its lien, and wronging the judgment creditor. Though the statutory writ of estrepement might not have been demandable until after levy and condemnation of the property, yet equity would have enjoined against such wrong. The building, as such, constituted a large part of the creditor's security, and his lien embraced every board and rafter which made a constitutent part of the structure. Nor were the rights of the assignees any more extensive. They were mere volunteers. They took the property as land only, incumbered as a whole and in every part by the lien of the judgment. Their title was, in one sense, subordinate to the right of the judgment creditor to take all which passed to them in satisfaction of his debt.

In *Heckelander's case*, 4 Rep. 63, a., it was resolved that if a lessee pulls down a house, the lessor may take the timber as a thing which was parcel of his inheritance. So in *Bowle's case*, 11 Rep. 81, b., it was held that if the lessee cut down timber, the lessor may take it; though severed, it is a parcel of the inheritance.

Nor will the tortious act of a stranger be allowed to injure the reversion. 2 M. & S. 494; 6 Term Rep. 55; 1 Vesey, 524; *Genth* vs. *Sir John Cotton*. These principles are re-asserted in *Shult* vs. *Barker*, 12 S. & R. 272; 7 Conn. 232; 3 Wendell, 104.

Nor will a severance by the owner of that which was a part of the realty, unless the severance be with the intent to change the character of the thing severed and convert it into personalty, pre-

vent its passing with the land to a grantee. Thus it was held in *Goodrich* vs. *Jones*, 2 Hill, 142, that fencing materials on a frame which have been used as part of the fences, but are temporarily detached without any intent to divest them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser.

Is the rule different when the severance occurs, not by a tortious act, nor by a rightful exercise of proprietorship, without any intent to divest the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice none. 4 Co. 86, b. Yet the maxim is not true if a tempest be permitted to take away the security of a lien creditor, and transfer that which was his to the debtor or debtor's assignees. If trees are prostrated *per vim venti*, they belong to the owner of the inheritance, not to the lessee. *Heckelander's case*, ut supra. He takes them as a part of the realty. True, he may elect to consider them as personalty, and this he does when he brings trover for their conversion, but, until such election, they belong to him as parcel of the inheritance.

If a tenant hold "without impeachment of waste," the property in the timber is in him; but if there be no such clause in his lease, and he remove from the land trees blown down, such removal is waste. That could not, however, be, unless, notwithstanding the severance, they continue part of the realty, for waste is an injury to the realty.

I am aware that it is said to have been held that if an apple tree be blown down, and the tenant cut it, it is no waste. 2 Rolle Ab. 820. That may well be, for the falling of the tree is through the act of God, not of the tenant, and the cutting of the fallen tree is but an exercise of the tenant's right to estovers; but if he remove from the land fallen timber, it has been ruled to be waste.

What, then, is the criterion by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree, prostrated by the tempest, is incapable of re-annexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall, by

his election, give it a different charater. In Shepherd's Touchstone so it is laid down, that that which is parcel, or of the essence of the thing, although at the time of the grant it be actually severed from it, does pass by a grant of the thing itself. And, therefore, by the grant of a mill, the millstone doth pass, although at the time of the grant it be actually severed from the mill; so by the grant of a house, the doors, windows, locks and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it.

It must be admitted that the case before us is one almost of the first impression, very little assistance can be derived from past judicial decisions. There is supposed to be some analogy between the character of these fragments of the building and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested; severance had never been contemplated. One of the best definitions of fixtures is that found in *Sheen* vs. *Rickie*, 5 Mees. & Wels. 171. They are those personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, or his personal representatives, though the property in the freehold may have passed to another person; yet even fixtures, which but imperfectly partake of the character of realty, go to the purchaser at sheriff's sale of land, though they have been severed tortiously, or by the act of God.

Thus, where a copper kettle had been detached from its site in a brewery, by one not the owner, had remained detached for a long period, and while thus severed had been pledged by the personal representatives of the owner, it was still held to have passed by a sheriff's sale of the brewery under a mechanics' lien filed before the severance. *Gray* vs. *Holdship*, 17 S. & R. 413.

Without, however, discussing the question further, it will be perceived that, in our opinion, the broken materials of the fallen building must be considered as parcel of the realty, as between the assignees and purchaser at sheriff's sale, and consequently that they passed by the sale to the purchaser.

The judgment is affirmed.

Supreme Court of Illinois—November Term, 1857—*at Mount Vernon.*

JOHN WOOD *vs.* ISRAEL BLANCHARD.

1. When the legislative will can be ascertained, from different enactments, they should be so construed as to make that will effective, although no express language is used which declares such legislative will.
2. The law-making power may continue or create an office, without an express declaration that such office shall be continued or created, if the intention to do so is manifested by requiring official acts to be performed by such officer, or if provision is made for filling vacancies in such office.

This was an action of trespass *vi et armis*, by *Blanchard* against *Wood*. The defendant pleaded specially, that he was acting as coroner, and made the levy complained of by virtue of his office, and by virtue of an execution placed in his hands as such coroner. To this plea there was a demurrer, which was sustained in the court below, on the ground that there was no such officer as coroner known to the constitution and laws of the State of Illinois.

CATON, Ch. J. Have we a coroner now? This is the only question presented by this record. The old constitution created the office of coroner; the mode of whose election, and whose duties were prescribed by subsequent acts of the legislature. The old constitution was superseded and practically repealed by the new; which omitted to create the office of coroner. It is not denied that the legislature has the power, under the new constitution, to create the office; but, as that has not been done in express terms, it is insisted that there has been no such officer since the adoption of the new constitution.

This argument is at least specious, but we think that a close examination of the subject will show that it is not sound. So far as the facts assumed in this argument are concerned, they are true, but there are other facts which it overlooks, and which are important to be considered in the determination of this question.

It is not necessary in all cases, that the legislature should, in explicit and affirmative terms, declare its will, in order to make that will the law. Where the legislative will is clearly and manifestly indicated by its enactments, such intention may be held to be the

law, though the legislature should, through inadvertence, have failed, in explicit and affirmative terms, to declare such intention. True, we must look to the language which it has used in order to ascertain its will; but if, from what it has said in the form of enactments, we can unmistakably ascertain its intention, it becomes the duty of the courts to declare and enforce such intention. If there be such an office as coroner in this State, it must depend for its existence upon legislative enactments, either those adopted by the constitution, or since passed, or upon constitutional inference; for, as before remarked, it is not expressly created by the constitution. The election law, and the law concerning sheriffs and coroners, of 1845, provide for the election of coroners, and prescribe their duties. Although the old constitution created the office, these laws would be ample, without its aid, to do so; but it is not to be denied that they were passed with a view to fill the office already created, rather than creating it. Still, as the new constitution expressly continued in force all previous laws not inconsistent with it, it has certainly continued these former laws in force. The legislature had the right to enact precisely such laws as these under the new constitution, and had this been done, it would thereby have created the office of coroner, and prescribed his duties beyond all question. We then ask, confidently, whether the convention did not do the same thing, by continuing those old laws in force? Suppose the schedule to the constitution had declared in express terms that the laws then force, providing for the election of coroners and prescribing their duties, should continue in force till altered or repealed by the legislature, who could truthfully deny that it was the intention of the convention that the office of coroner should continue to exist? So that, we think, we may truly say that, if the legislature, in passing those laws, did not intend to create the office of coroner, the convention by continuing them in force, did intend to continue that office in existence, subject to the control of the legislature. The language of the first section of the schedule of the new constitution, is this, "That all laws in force at the adoption of this constitution, not inconsistent therewith, shall continue and be as valid as if this constitution had not been adopted." Now,

when we admit that the legislature might, under the new constitution, have enacted just such laws as those referred to, we admit that those laws are not inconsistent with the constitution, for the legislature could not pass any law inconsistent with it. If, then, they are not inconsistent with it, they are declared to be as valid as if the constitution had not been adopted. All the laws thus continued in force, are, strictly speaking, re-enactments by the convention, and we therefore look to that for their validity. We repeat, therefore, that we are warranted in saying that the office of coroner was continued by the adoption of the new constitution.

But this is not all; we have further, and, if need be, still more direct proof that the office of coroner should still continue after the adoption of the new constitution. The fourteenth section of the schedule is as follows: "That if this constitution shall be ratified by the people, the Governor shall forthwith, after having ascertained the fact, issue writs of election to the sheriffs of the several counties of this State; or, in case of vacancy, *to the coroners*, for the election of all the officers whose election is fixed by this constitution or schedule; and it shall be the duty of said sheriffs *or coroners* to give at least twenty days notice of the time and place of said election, in the manner now prescribed by law." Now, here the convention itself recognizes the existence of the office of coroner after the old constitution should be superseded by the new; for it required of coroners official acts after it should be ratified by the people, and when in full and complete operation. We should subject the convention to the charge of a very strange absurdity indeed, if we say it intended to abolish the office of coroner absolutely, and that all the coroners in the State should cease to be officers the moment the new constitution took effect, while it still required them to perform official acts after that time. In the face of these provisions, it is not to be denied that it was the affirmative will and positive intention of the convention, in framing the constitution, and of the people in adopting it, that the office of coroner should continue to exist, and that all the coroners then in office should continue after the adoption of the new constitution. If the office continued for a single moment, after the adoption of the new constitution, it

still continues, unless it has since been abolished by competent authority. If they were coroners, so as to give notice of the elections under the new constitution, as required by that instrument, when, since then, has the office been abrogated? Suppose the governor had listened to the specious argument that the new constitution had abolished the office of coroner, and had refused to send writs of election to coroners in counties where the office of sheriff was vacant, substantially telling the convention and the people that they did not know what they were about when they ordered him to do so, and that they had unwittingly, no doubt, left every county in the State without a coroner or any other officer to take his place, would he not have been justly charged with captiousness? And now we are, in fact, asked to do substantially the same thing.

But the Legislature, subsequent to the adoption of the new constitution, has not been entirely silent on this subject. At the second session of the first Legislature convened under this new constitution, an act was passed which provided "that whenever a vacancy shall happen in the office of sheriff, county surveyor or *coroner*, of any county in this State," the clerk shall give notice to the Governor, who shall issue writs of election, &c. Now, here the Legislature, without deeming it necessary to create the office of coroner, recognize it as already existing, and provide for filling vacancies which may occur in it.

It may be said with truth, that in none of the provisions of the constitution or the statutes to which I have referred, is the office expressly created as it was in the old constitution, and I presume that no such provision exists; but there is an implication, from the language used in both, so pregnant as to leave no doubt on the mind of any one, that it was the deliberate and affirmative will of the competent law making powers, that the old office of coroner should continue after the adoption of the new constitution, as it before existed; that it acquires the force of a positive enactment to that effect.

When the constitution requires that the coroner shall do certain official acts at a particular time, it in effect declares that there shall be an office at that time, which may be filled by such an officer.

When the Legislature provided for the election of coroners to fill vacancies in that office, it manifested an indisputable intention that there should be such an office, which might become vacant; which, if we exercise our common understanding, we can no more ignore than we could an express provision to that effect. It is the object of construction to find out the real intention of the writer from the language used, and, in construing statutes, we study their language and carefully consider every word, discarding none as useless, if possible, in order to find out the true meaning or will of the law giver, and when that is ascertained, we know what the law is, and must so declare it. Now, unless we hold there is such an office as coroner, then we must declare that all the constitution says, and all the statute says about this office, is mere idle verbiage, without purpose or meaning. We are not prepared to reject all this as meaningless, but are of opinion that the provisions referred to were inserted for a purpose, which it is the duty of the court to effectuate.

As a case most directly in point, and a stronger one than this, where this court gave effect to the manifest will of the Legislature in the absence of any positive enactment declaring such will, but where it had to be gathered from various statutes, we refer to that of *The People* vs. *Thurber*, 13 Ill. R. 554. There no express provision could be found, either in the constitution or the statute, declaring who should be the successor to the clerk of the county commissioners' court, which was abolished by the new constitution. The laws had imposed a great variety of *ex officio* duties upon that officer, in no way connected with the business of the court of which he was clerk, but which the very continuance of the government required should be performed by some one, and no law could be found declaring who should perform those duties after that office was abolished. After examining a great variety of acts, it became so apparent that the Legislature supposed and intended, and so willed, that the clerk of the new County Court should, in all things, succeed to the duties of the clerk of the County Commissioners' Court, that we did not hesitate to declare that such was the law. To have declared otherwise would have defeated the clear will and

intention of the Legislature. So here, should we now declare that there is no such office as coroner, we should, beyond all doubt or controversy, defeat the obvious and manifest will and intention of both the convention and the Legislature, which is clearly manifested by the laws which they and the people, by their vote, have enacted. This, as we understand our duty, we ought not to do.

We freely confess we are glad that we find ourselves fully authorized to hold that the office of coroner still continues; for to hold that there has been no such officer in this State for the last nine years, and that all which has been done by those who were supposed to be coroners, was utterly void, would involve the whole community in calamities which it would be impossible now to estimate.

The judgment is reversed and the cause remanded.

Supreme Court of Illinois—November Term, 1858. *At Mount Vernon.*

THOMAS RODNEY *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY.

1. The constitution of Illinois prohibits slavery; therefore, negroes within its jurisdiction are supposed to be free.
2. The State of Illinois being an independent sovereignty, will determine for itself the condition of all persons within its territory; subject to the constitution of the United States, and the laws made under the authority of that instrument.
3. Slavery is the creation of municipal regulations in States where it exists, and such regulations have no extra territorial operation or binding force in another sovereignty.
4. The laws of other States recognizing slavery, being repugnant to the laws and policy of the institutions of Illinois, neither the law of nations nor the comity of States can affect the condition of a fugitive in Illinois, so as to give the owner any property in, or control over him, by force of any state authority.
5. The remedy in matters connected with fugitive slaves, is to be found under acts of Congress, and in the courts of the United States.
6. Property in persons being repugnant to the constitution and laws of Illinois, trover cannot be maintained for the recovery of a person, or for satisfaction for the loss.

The facts of the case are sufficiently stated in the opinion of the court, which was delivered by

SKINNER, J.—The plaintiff sued the Illinois Central Railroad Company in case, for receiving as a passenger on their road, at Cairo, in this State, the negro slave of the plaintiff, held to service under the laws of Missouri, knowing the negro was the plaintiff's slave under the laws of the State of Missouri, escaping from his service, and carrying the negro, as such passenger, to Chicago; thereby, in this State, aiding the fugitive to escape from service. The declaration also contains a count in trover for the conversion, by the defendants, in this State, of the plaintiff's slave, held to service under the laws of Missouri.

The court sustained a demurrer to the declaration, and upon this decision the assignments of error are founded.

The constitution of this State prohibits negro slavery, and, therefore, negroes within our jurisdiction are presumed to be free. *Hone* vs. *Ammons*, 14 Ills. 27; *Bailey* vs. *Cromwell*, 3 Scam. 71; *Kinney* vs. *Cook*, Ib. 232.

The State of Illinois, as one of the independent sovereignties of the Union, will determine the condition of all persons within the State, according to her own laws and institutions, and can be limited or controlled in this respect only by the constitution of the United States, and the laws of Congress made under authority of that instrument.

Slavery, in the States where it exists, has its foundation in the municipal regulations of such States which have no extra-territorial operation, and no binding force in another sovereignty.

The law of Missouri, under which the negro owes service to the plaintiff, being repugnant to our law and the policy of our institutions, neither, by the law of nations or the comity of States, can affect the condition of the fugitive slave in this State, or, within our jurisdiction, give the owner any property in or control over him. The constitution of the State is here the paramount law, except in so far as the constitution of the United States, or the powers therein delegated to Congress, may limit or control its operation. The

owner, therefore, by force of the laws of another State, under the law of Illinois, has no property in the fugitive, and can here, under State authority, assert no property in or power over him. *Jones* vs. *Vandzant*, 2 McLean R. 596; *Giltner* vs. *Gorham*, 4 Id. 402; *Prigg* vs. *Commonwealth of Pennsylvania*, 16 Peters R. 539.

The constitution of the United States, however, gives the owner the right of reclamation of his slave, escaping from service, wherever he may be found within the United States; and Congress, under the authority of this clause, and in the rightful exercise of power, to render the provision effectual, and to afford ample and uniform remedy for recaption and return of fugitive slaves, by the act of 1793, provided for the recaption and surrender of fugitive slaves within the States and Territories of the Union, imposed penalties for aiding the escape of such fugitives, and for opposing or interrupting the reclamation under the remedies given the owner. By the terms of that act, concurrent jurisdiction seems to have been conferred upon federal and State tribunals.

By the act of Congress of 1850, on the same subject, the right of the owner to reclaim his fugitive slave is declared; remedies for recaption and return of the fugitive to the State or Territory whence he may have fled, are provided; punishments for obstructing recaption and return, and for harboring or concealing the fugitive to prevent recaption, are provided; and damages for the injury, by way of penalty, are given to the owner, to be recovered by action in the district or territorial courts of the United States, where the offence is committed. The act of 1850, by necessary implication, repeals the act of 1793 so far as the provisions of the former conflict with the latter, whether the conflict consists in remedies given or penalties imposed. The act of 1850 not only provides different remedies, penalties and modes of procedure, but names the forums in which they may be enforced; and therefore, aside from the question of power of Congress to confer jurisdiction upon State tribunals, it would seem they intended to confine—in execution of the federal laws upon the subject—jurisdiction to the federal courts.

The constitution of the United States vests the federal judicial power in the Supreme Court, and such inferior courts as Congress

may see fit to establish; and provides that the judicial power shall extend to all cases, in law and equity, arising under the constitution and laws of the United States.—*Constitution of the United States*, Art. 3.

The federal courts, therefore, are the proper forums for causes arising under the constitution of the United States, and the laws of Congress made under its authority; and the State tribunals (at least unless jurisdiction is expressly conferred) cannot take cognizance of such causes.

If, however, the State court has jurisdiction of the cause under the common or statutory law of the State, the federal constitution or laws coming incidentally in question, will be recognized and enforced. *Martin* vs. *Hunter*, 1 Wheaton, 336; *Houston* vs. *Moore*, 5 Ib. 49; *Story's Com. on Constitution*, sects. 1,759 to 1,755; 1 Kent's Com. 396 to 405; *United States* vs. *Lathrop*, 17 John. R. 4. See also *Prigg* vs. *Commonwealth of Pennsylvania*; *Moore* vs. *The People*, 14 Howard U. S. R. 13; *Thornton's Case*, 11 Ill. 332.

The count in trover cannot be sustained for the reason stated. Property in persons being repugnant to our laws and the genius of our State institutions, our courts will not enforce, as a general rule, the laws of other States recognizing this species of property, where the cause of action, based upon such laws, arises in this State. *Hone* vs. *Ammons*, 14 Ill. 29.

Trover is brought for the wrongful conversion to another's use, of one's personal property, and judgment therein for damages, with satisfaction, vests in the defendant the property converted. The plaintiff, under the local law where the alleged conversion occurred, had no property in the negro, and none under that law, by force of a recovery in the action and satisfaction, could vest in the defendant.

Judgment affirmed.

In the Louisville (Ky.) Chancery Court, March, 1858.

CAMP vs. THE WESTERN UNION TELEGRAPH COMPANY.

1. Where a telegraphic communication was sent subject to the express condition that the telegraph company would not be liable for mistakes arising from any cause unless the message was repeated by being sent back; it was *held,* that the plaintiff was bound by his contract, and could not recover unless he brought himself within the terms of the company's undertaking.

2. Telegraphic companies are not, in any just sense, common carriers, and cannot be made liable upon the principles applied to carriers.

The opinion of the court in which the facts sufficiently appear was delivered by

LOGAN, J.—If the plaintiff was not legally liable to pay Gibson & Co. sixteen cents for the whiskey which was sent him, he would have had no pretext, in any view of this case, for recovering the damages alleged to have been incurred in consequence of his proposition being incorrectly and erroneously transmitted through the agency of defendant.

I shall not inquire whether the plaintiff was liable for the consequence of the unauthorized proposition communicated through defendant's mistake to Gibson & Co.

For, admitting that defendant, though a special agent to convey a particular proposition, could and did, by erroneously conveying a different proposition, impose upon plaintiff a liability proportioned to the difference between the authorized and the unauthorized proposition, which liability would not have been incurred but for the mistake committed by defendant, it does not follow that plaintiff can recover the amount of said liability in this action.

The plaintiff avers that defendant agreed to transmit to Gibson & Co. a certain message, and failed to transmit it correctly; in this, that the message agreed to be sent was to pay *fifteen* cents per gallon for certain whiskey; whereas, the message actually delivered was to pay *sixteen* cents per gallon.

There is no allegation that the failure to deliver the message correctly was the result of negligence.

It appears that the failure to deliver the message was the result of a mistake to which, from the very nature of telegraphic operations, communications are liable; and that the message in this case was sent subject to the express condition that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back.

I see no ground for saying that this condition was void. Without this precaution of repeating messages, mistakes by telegraph are unavoidable. And there is no principle of public policy that does or should prohibit a telegraph company from being prudent enough to protect themselves from ruin, by requiring such a condition in the transmission of messages.

Had the message been repeated in this instance, the mistake would probably not have occurred, and it is idle to say that the defendant was bound, for a compensation of *fifty cents*, to insure the message, unconditionally and absolutely, against all mistakes.

The points of difference between the nature of telegraph companies and the nature of common carriers are so numerous and so obvious as to render the unqualified application of the law of common carries to telegraph companies delusive and dangerous.

But even in the case of common carriers, special agreements limiting liability, may be made.

If, however, special limitations of common law liability were always void in the case of common carriers, this would be no reason to hold a limitation void in respect to telegraph companies.

The rule and mode of compensation charged by telegraphic offices, the secret nature of messages, and the impossibility of determining the value of them, or the pecuniary consequences of mistakes and miscarriages, and the peculiar liability of telegraphic communications to mistakes, would furnish ample reason for exempting them from the strict operation of the old law of common carriers.

Telegraphic messages are paid for by the line or the word,