in declaring the statute unconstitutional, impugns the action of Congress; and, as this is to be done only when an imperative official duty, it should be shown to be so by conclusive reasons, fully stated. The relation of the different branches of the government would seem to require this, and it is believed to have been the uniform practice of the Supreme Court heretofore. And, more than all, the decision deprives the important public interests, involved in the litigation against the United States, of that protection by the Supreme Court which the Constitution intends and the Act of Congress sought to attain, and which the public security imperatively demands. If there is any litigation entitled to the protection of the highest legal tribunal, it is that of the Nation; and there is no way in which the action of the Supreme Court can be secured to this important subject of its constitutional jurisdiction, less onerously to its justices, than by an appeal from an inferior court.

It is essential to the interests of the United States and of its numerous creditors, that the action of the Court of Claims and of the Supreme Court should be promptly assured to them; for the judicial concerns of a great nation can be properly administered only by its judicial tribunals. These only are contrived for the purpose, and adapted to it by their organization, processes, and modes of procedure. Other departments of the government are adapted only to different duties, and are fully occupied by them.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF NEW YORK.[2]

SUPREME COURT OF PENNSYLVANIA.[3]

SUPREME COURT OF VERMONT.[4]

AGENT.

Broker's Commissions.—A broker, or agent, who undertakes to sell property for another for a certain commission, if he finds a purchaser willing to purchase at the price, has earned and can recover his com-

[1] From Charles Allen, Esq., Reporter; to appear in vol. 9 of his Reports.

[2] From Hon. O. L. Barbour, Reporter; to appear in vol. 43 of his Reports.

[3] From R. E. Wright, Esq., Reporter; to appear in vol. 49 Penn. State Rep.

[4] From W. G. Veazie, Esq., Reporter; to appear in 36 Vermont Rep.

mission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or agent: *Doty* v. *Miller*, 43 Barb.

AGREEMENT.

Fraud—Specific Performance.—H. being the holder of a first mortgage, made by L. to secure $12,000, the principal sum of which was then due and payable, at the option of H.; and P. being the owner of a second mortgage on the same premises, made by L. which he was then foreclosing; in order to prevent the threatened foreclosure of the first mortgage, P. made an agreement with H., whereby, in consideration of H.'s waiving his option to consider the principal of the first mortgage due, he agreed: 1st. To pay the interest, &c., in arrear; 2d. To prosecute the foreclosure of the second mortgage; and 3d. In the event of his buying the mortgaged premises "in his own name or otherwise" at the foreclosure sale, subject to the first mortgage, to reduce the principal sum secured by the said first mortgage by paying $3000 on account thereof. At the foreclosure sale, B. purchased the mortgaged premises, and took the sheriff's deed in his own name, at the instance and for the benefit of P., and with full knowledge of the agreement made by P., and for the purpose of enabling P. to evade the same.

Held. 1st. That the agreement made by P. was a lawful and valid agreement.

2d. That the complaint showed a primâ facie right in H. to come into a court of equity for the purpose of obtaining a decree declaring the sheriff's deed to B. to be fraudulent, inoperative, and void, so far as it prevented the specific performance of the agreement of P. to reduce the first mortgage.

3d. That a court of equity having jurisdiction for that purpose, it could proceed and decree a specific performance of the agreement of P. to reduce the first mortgage by paying $3000 on account thereof: *Livingston* v. *Painter, Administrator*, 43 Barb.

ASSAULT AND BATTERY.

Evidence.—If, in an action to recover damages for an assault and battery, the defendant, for the purpose of showing provocation, has been allowed, without objection, to prove that the plaintiff had previously charged him with a crime, the admission of evidence in reply, to prove facts tending to show that such charge was true, is sufficient ground for setting aside a verdict for the plaintiff: *Mowrey* v. *Smith*, 9 Allen.

ASSUMPSIT.

Implied Assumpsit for Services rendered—What Relationship will rebut.—Though the relationship of father-in-law and son-in-law is not, in itself, sufficient to rebut the presumption of a promise to pay for services rendered, yet where a father-in-law went, with his two sons, to live upon a small farm bought by his son-in-law, partly for a home for them, and there remained until the death of the son-in-law, domesticated, and occupying the house as a part of the family; the father and sons being clothed, and the sons and daughter educated at the expense of the son-in-law, who was for the greater part of the time absent: and

no debit and credit account was kept nor any contract made by the son-in-law to pay his father-in-law for services, nor liability therefor admitted by him: these facts were held sufficient to rebut the presumption that there was an understanding that one was to pay and the other to receive compensation for services rendered: *Amey's Appeal,* 49 Penn.

ATTACHMENT.

Will not lie in a Claim for Damages.—An attachment cannot issue as a provisional remedy, under section 227 of the Code, in an action of trespass for taking and carrying away personal property; the claim being for damages not ascertained, but to be assessed by a jury: *Shaffer* v. *Mason,* 43 Barb.

What Wages are exempt from Execution—Appropriation of Payments on account.—If a master carpenter receive from his employer for the labor of his hands more than the wages paid by him to them, the profits on labor thus received are not exempt from attachment, under the Act of 16th June 1836: *Smith, Garnishee of Hipple,* v. *Brooke,* 49 Penn.

Where, of the whole amount due the builder, part is for his individual services and a part are profits of labor, the employer has the right of appropriating the payments made by him on account, to either fund; if he do not, the employee may; if exercised by neither, then the law will make the appropriation: *Id.*

Thus where a creditor of the mechanic attaches the balance due in the hands of his garnishee, as against the latter, the creditor succeeds to all his debtor's rights: and therefore the law will appropriate the partial payments in such a manner as will most benefit the attaching creditor, that is, to the fund protected by the statute, the wages for individual labor: *Id.*

Where the question of appropriation is left to the jury, who apply it as the law would have done, the garnishee cannot complain of the submission of the question to the jury: for an imperative ruling of the question as matter of law would have necessarily been adverse to him: *Id.*

BANKS.

National Banks—Taxation of, and of Stockholders.—National banks created by the Acts of Congress of February 25th 1863 and June 4th 1864, are lawfully created, and are to be deemed and taken to be agencies created for the purpose of carrying on the operations of the Federal Government: *The City of Utica* v. *Churchill and Others,* 43 Barb.

A tax on a stockholder, for the stock held by him in one of these banks, is a legitimate and proper subject of state or municipal taxation, and the stockholder is liable to be so taxed, under the laws of the state: *Id.*

A tax upon a stockholder, for the stock held by him in a national bank, is not a tax on the bank, nor on its property, but is upon property held and owned by the stockholder only, and in which the bank has no manner of interest: *Id.*

The laws of the state, and not the laws of Congress, are to furnish the guide by which to ascertain whether the stock of the national banks can be taxed, and the place and manner of taxing them: *Id.*

The stock of the national banks is personal property, and is therefore taxable, under the 1st section of the New York Tax Law, which declares that all land, and all *personal estate* within the state, whether owned by individuals or by corporations, shall be liable to taxation, &c.: *Id.*

Inasmuch as national banks cannot be taxed on their capital, the stockholders are subject to taxation, on their stock, under the 14th section of the New York Tax Law: *Id.*

But the stockholders cannot be lawfully assessed in the ward or town in which the bank is located, when their residences are in other towns or wards, or in other states: *Id.*

CERTIORARI.

A certiorari, to review an assessment made by the Commissioners of Taxes and Assessments of the City and County of New York, will not lie after the assessment-roll has been delivered by the commissioners to the Board of Supervisors, and the tax has been collected: *The People ex rel. The Metropolitan Bank* v. *The Commissioners of Taxes and Assessments*, 43 Barb.

After the assessment-roll has been delivered to the supervisors, the commissioners have no longer any control over the assessment, and cannot correct or reduce it: *Id.*

A certiorari will not be allowed, for the purpose of enabling a party, by procuring a reversal of the proceeding of the Commissioners of Taxes, to recover back, by action, money paid by him for taxes: *Id.*

CONTRACT.

For sale of Definite Quantity of Goods.—A contract for a certain fixed quantity of merchandise, to be delivered on shipboard by the vendor, is not complied with by a tender of bills of lading for a larger quantity, and a demand of payment therefor at the price agreed on cannot be enforced by the vendor: *Stevenson* v. *Burgin*, 49 Penn.

Measure of Damages on Contract for Delivery of Stock.—In an action on a contract for the sale of specific stock which without the knowledge of the vendor had already been sold to another by his agent, the plaintiff can only recover nominal damages: *Wilson* v. *Whitaker*, 49 Penn.

Time of Payment.—The plaintiffs sold the defendant a quantity of marble, to be used by the defendant in the construction of a work for the United States Government, for which the defendant was to pay the plaintiffs when his contract with the government should be accepted and he should receive his pay from the government. *Held*, that the plaintiffs' demand became payable, not when the defendant became *entitled* to his pay from the government, but whenever, by due diligence, he might have received payment from the government: *Vermont Marble Co.* v. *Man*, 36 Vermont.

The work in question was accepted in 1860, but the defendant afterwards made two alterations in the work, so that payment was delayed until December 1861. *Held*, that the delay of payment having been caused by the act of the defendant, the stipulated credit had expired, and that the action brought in August 1861 was not premature: *Id.*

Corporation.

Liability for Compensation of Officer.—Corporations are not liable on a *quantum meruit* for services performed by their officers. There must be an express contract for compensation, or there can be no recovery: *Kilpatrick* v. *Penrose Ferry Bridge Co.*, 49 Penn.

Visitorial powers of Chancery—Actions by Stockholders—Appointment of Receiver—Injunction to restrain Trustees or Directors.—The visitorial powers conferred upon the Court of Chancery by the article of the Revised Statutes relative to proceedings against corporations in equity, can only be exercised by the Supreme Court on an application made at the instance of the Attorney-General, or of a creditor of the corporation, or of a director, trustee, or other officer having a general superintendence of its concerns: *Howe* v. *Denel and Others*, 43 Barb.

An action cannot be brought, under the statute, by a *stockholder*, against the corporation and its trustees, to have the corporation dissolved, and restrained from the exercise of corporate powers; to restrain the trustees from exercising any powers as trustees; and for the appointment of a receiver and the sale of the property of the corporation: *Id.*

Nor can the court entertain such an action, or grant the relief asked for, under its general powers as a court of equity: *Id.*

In no case, except in respect to moneyed corporations, or insolvent corporations, can a stockholder have a receiver appointed, on a preliminary injunction, with authority to take entire possession of the corporation and thereby work its dissolution: *Id.*

Yet, on the application of a stockholder, charging fraud against some of the trustees or directors, *it seems* such directors or trustees may be restrained by injunction from committing any such fraudulent acts as are charged. But such injunction should apply only to the particular acts complained of, and not to the general business of the corporation: *Id.*

Agent—Appointment of by Directors outside the State.—The conferring of authority by the directors of a corporation upon an agent to execute a deed, is not a corporate act. The directors act in such a case, not as the corporation, but as the agents of and in behalf of the corporation. And this authority may be conferred by a vote passed at a meeting of the directors without the state where the corporation was created and exists: *Arms* v. *Conant et al.*, 36 Vermont.

Deed.

Alteration after Execution.—If a deed which is complete in form with the exception of the omission of the name of the grantee is in that condition signed and sealed, the subsequent insertion of the name of the grantee and the change of a qualified covenant into an absolute one, in the absence of the grantor, though by his parol authority, will make the deed invalid as to him, and no action will lie against him upon any of the covenants therein contained. And it is immaterial that such alterations are made by a co-grantor, and that a description of the occupation of the contemplated grantee had been inserted at the time of such signing and sealing: *Basford* v. *Pearson*, 9 Allen.

If, under an oral agreement for an exchange of lands, one party has executed and delivered his deed, and the other has refused or failed to fulfil his agreement, or delivered an invalid deed, no action for money had and received can be maintained against the latter, although the land conveyed to him was estimated at a fixed sum, and has since been sold by him and converted into money. The declaration should be for the price or value of the land: *Id.*

Delivery implied from reference to it in Will of Grantor.—Where a deed duly executed and acknowledged conveying a farm in fee simple to grantor's sister was left in the custody of a third party undelivered and without any instructions as to delivery, and a will was subsequently made by the grantor in which he devised two acres of said farm to another for life, with a proviso that at the death of the devisee the same should "revert back to said farm and become the property of my said sister together with other lands I have already conveyed by deed to her:" *Held*, that the sister was entitled to the farm in fee simple subject to the life estate of the devisee in the two acres: *Thompson's Executors* v. *Lloyd*, 49 Penn.

Evidence.

Attestation of Court Papers.—The attestation of papers from a police court by one who assumed to act as clerk *pro tem.*, and used the seal of said court, is *primâ facie* sufficient: *Commonwealth* v. *Connell*, 9 Allen.

Auditors—Minority Report—Statute of Limitations—Experts.—A minority report made by one of three auditors to whom a case has been referred is inadmissible in evidence: *Lincoln* v. *Taunton Manufacturing Co.*, 9 Allen.

If a case has been referred to auditors to determine whether the defendants have injured the plaintiff's land in a particular manner, and whether his land has depreciated in value, and if so, how much, and to what extent the depreciation has been caused by the defendants, if any, and the auditors have reported that the land has depreciated to a certain specified extent, but that the depreciation has not increased within six years before the commencement of the suit, and that they did not find that such depreciation had ever, to any appreciable extent, been caused by the defendants, the whole report may be read to the jury, although the defence of the Statute of Limitations was not set up in the answer: *Id.*

In an action to recover damages for an injury to the plaintiff's land by the working of a copper-mill which produced noxious gases, and from which poisonous substances were discharged, so that the gases and water from the mill afterwards reached and injured the land, the evidence of persons other than experts is inadmissible to show that other lands in the vicinity, not owned by the plaintiff, but exposed to the same influences, have been injured from the same cause; or that other lands in the vicinity, not owned by the plaintiff, and not exposed to the same influences, have remained unimpaired in their productions: *Id.*

If in such action an expert called by the plaintiff has testified that he has obtained copper from grasses taken from the plaintiff's land, the defendants may introduce similar testimony to show that copper exists

and has been obtained in grasses not exposed to influences like those complained of: *Id.*

EXECUTION.

Momentary Seisin of Land by Debtor.—If a debtor's interest in land which is subject to a mortgage and to a life estate is attached on mesne process, and subsequently, for the purpose of raising money to pay off the mortgage, the life estate is released to him and he thereupon executes a new mortgage of the premises to another person as security for money lent by him to pay off the first mortgage, and then reconveys the life estate to the same person who held it before, and the first mortgage is paid and discharged, and these acts are all done at one time and as parts of the same transaction, the attaching creditor cannot avail himself of such instantaneous seisin of the debtor, or levy his execution upon a greater estate than his debtor owned in the premises at the time of the attachment: *Hazleton* v. *Lesure*, 9 Allen.

Agreement of Creditor to enforce his Judgment only on certain Property.—An agreement by the plaintiff in a contested suit, in consideration of the defendant's consenting to be defaulted, not to enforce the execution which he should obtain, except upon certain specified property, is valid and binding: *Whitney* v. *Haverhill Ins. Co.*, 9 Allen.

FIXTURE.

Platform Scales.—Platform scales, set in an excavation in a highway and extending under a building upon adjoining land and up into a room to which that part of the scales by which the weight is ascertained is firmly attached, are a fixture; and, if put there by a tenant, must be removed by him before the expiration of his term, or they will pass to the owner of the real estate: *Bliss* v. *Whitney*, 9 Allen.

FORMER RECOVERY.

Action in Contract and in Tort for same Subject-matter.—A judgment against an attorney in an action of contract for the breach of his written agreement, for a sufficient consideration, to discharge a judgment and execution, is a bar to a subsequent action of tort against him to recover further damages for an arrest by his directions upon the same execution: *Smith* v. *Way*, 9 Allen.

HUSBAND AND WIFE.

Mortgage by Married Woman for Purchase-money.—Under the Married Women's Acts of 1848 and 1849, a married woman has capacity, notwithstanding her coverture, and irrespective of the Act of 1860, authorizing a *feme covert* to carry on a trade or business and protecting her earnings, to purchase a stock in trade, business, and good-will, by executing a mortgage on her own separate real estate, and to recover for work, labor, and services done and performed, and materials furnished by her in the course of such business: *James, Executor, &c.*, v. *Taylor*, 43 Barb.

INSOLVENCY.

Action by Citizen of another State.—The Supreme Court of the United

States, having decided that a discharge under the insolvent laws of this commonwealth is no bar to an action upon a promissory note given to a citizen of another state, who has not proved his claim in insolvency, although the note was payable in this commonwealth, this court will adopt and apply the same doctrine: *Kelley* v. *Drury*, 9 Allen.

Discharge of Debtor.—A discharge granted to an insolvent debtor under the provisions of the Revised Statutes in relation to "voluntary assignments made by an insolvent and his creditors" *held* void, where the affidavit of the petitioner, annexed to his petition, instead of stating that the petitioner had not disposed of, or made over, any part of his estate for the future benefit of himself *or* his family, as required by section 7, stated that he had not disposed of, or made over, any part of his estate for the future benefit of himself *and* family: *Merry, Admin., &c.*, v. *Sweet and Others*, 43 Barb.

The total omission of a fact necessary to be proved to confer jurisdiction upon an officer will make all his proceedings void: *Id.*

It *seems* the judge has no authority to grant a discharge where a portion of the creditors omit to state the nature of their demands; or where the schedule of the insolvent omits to state the true cause and consideration of the indebtedness to certain of his creditors: *Id.*

Insurance.

Mortgage—Subrogation.—If the interest of a mortgagee in possession has been insured *eo nomine*, at his own expense, the insurers, in case of loss by fire before the mortgage-debt is paid, cannot, upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them and be subrogated to the rights and remedies of the insured under the mortgage: *Suffolk Ins. Co.* v. *Boyden*, 9 Allen.

Removal of Goods.—A policy of insurance upon goods "contained in the third story of a four-story building," over two specified numbers of a certain street, will cover such goods after their removal into another room subsequently hired and occupied by the insured in the same story of the same building; although the policy provides that it shall be void if the property insured shall be removed without necessity to any other place: *West* v. *Old Colony Ins. Co.*, 9 Allen.

Judicial Sale.

Title of Purchaser.—*Semble*, that the title of real estate sold by order of the Orphans' Court is legally vested in the purchaser who has paid the purchase-money, though security was not entered by the administrator according to the order of the court: *Dixcy's Executors* v. *Laning*, 49 Penn.

But, even if the decree confirming the sale was void, for want of the prescribed security it could not be so declared in a collateral action of covenant for the arrears of the ground-rent sold, but only on appeal from that decree: *Id.*

A purchaser at an Orphans' Court sale is not responsible for the application of the purchase-money; and where, in the affidavit of defence to the action of covenant setting up the alleged defect of title, no misapplication of the purchase-money was alleged, the affidavit established no defence, even if the purchaser could be held to the proper application of the proceeds of the sale: *Id.*