penses really were. But were it more clear and distinct, I should be unwilling to refuse a discharge to the bankrupt upon any ground not expressly set forth in the specifications. In no one of the specifications filed is this charge distinctly presented. The burden of all the specifications is fraudulent preferences or payments. Nowhere is it alleged that the family expenses paid by the bankrupt after the 2d of March 1867 were not necessary expenses. The only specification in which the subject of "extravagant living" is at all alluded to, is the 16th, which is, as I have said before, a mere recapitulation of former specifications, and evidently not intended to introduce any new charge.

Then, too, we must take into consideration the fact to which I have before adverted, that as late as May 1867 the bankrupt had reason to expect that an arrangement would be made with his creditors, and that it would not be necessary for him to apply for the benefit of the Bankrupt Act. Mr. Maclay expressly says, that up to that time he had been endeavoring to arrange the gold debts of Mr. Rosenfeld, and believed that he would be successful in his efforts to do so. This, perhaps, might, to some extent, have justified the bankrupt in keeping up his establishment, and continuing to live in a way which, under other circumstances, would not have been proper.

On the whole, I am of the opinion that the bankrupt is entitled to his discharge.

LEGAL NOTES.

SERVICE OF CIVIL PROCESS. PRIVILEGE OF MEMBERS OF CONGRESS.—The case of *Charles W. Wooley* v. *Benjamin F. Butler*, in the Superior Court of Baltimore, was an action for an alleged false imprisonment. The defendant, a Representative from Massachusetts, while passing through the city of Baltimore on his return home from a session of Congress, was served with a writ of summons. At the September Term 1868, defendant moved to quash the writ on the ground that the service was in violation of his privilege as a member of Congress. The case was argued at great length by Hon. Caleb Cushing and William Schley, Esq., for General Butler, and Hon. R. T. Merrick, R. J. Brent and W. M. Addison, Esqs., for plaintiff. For the motion it was argued that the word "arrest," in the Constitution (art. I., sect. 6), includes all civil process, and that by the analogies of the privilege of jurors, witnesses, attorneys, &c., this was the exemption to which the privilege extended. The court, however, DOBBIN, J., was of opinion that the word "arrest," in the Constitution was used in its ordinary

sense, and as the summons in this case involved neither personal detention in the first instance nor liability to attachment for disregarding it subsequently, the motion to quash was refused.

In *Thomas C. Hoppin v. Thomas A. Jenckes*, in the Supreme Court of Rhode Island (February 1868, not yet reported), another question arose on the same subject of privilege. That was an action against defendant as endorser of certain notes, and he filed a plea in abatement setting forth that he was a member of Congress, that Congress had adjourned on the 20th of July, that the writ was served on August 23d, and that he was then engaged as a member of a committee of Congress authorized to sit during the adjournment.

There was no question as to the arrest, but it was claimed that the privilege lasted forty days after the session, in analogy to the privilege of members of Parliament.

The court, however, BRADLEY, C. J., decided, on a very elaborate and careful review of the authorities, both English and American, that it lasted only a *reasonable* or *convenient* time. What is especially to be commended in the opinion is the very thorough *historical* method of examining and construing the clause in the Constitution; a method, we may venture to say, treated rather too cavalierly in the opinion of the Baltimore court. A paragraph in C. J. BRADLEY'S opinion expresses our idea so well that we give it in his own words :—

"We have discussed, it may seem, at unnecessary length, the question presented by this plea; but it called for a consideration of the law of England as to the duration of the privilege from arrest of a member of Parliament, and also the consideration of a clause of the Constitution of our country adopted from the parliamentary law of England. *It is not enough in such cases to be content with what may be termed a common sense interpretation* or with a mere dissent from the opinions expressed or implied of such high authority as has been quoted to us. A court must satisfy itself by deeper and more thorough inquiries whether the obvious interpretation, or the one suggested by such learned minds, is the true one."

USURY BY NATIONAL BANKS.—In the case of *Malone, Ex'r. of Fall, v. The Heirs and Creditors of Fall*, Chancellor SHACKELFORD, of the Middle District of Tennessee, held that a national bank taking usurious interest on a loan, forfeits the entire debt, principal and interest. The National Bank Act (Act of June 3d 1864, § 30, Brightly's Dig. vol. 2, p. 58) enacts that banks may take such interest as is allowed by the law of the state in which the bank is situated, or in default of any provision in the state law, 7 per cent. may be taken. The section then continues: "And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid *shall be held and adjudged a forfeiture of the entire interest* which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." It appears by the opinion that the law of Tennessee merely forfeits in such case the excess of interest over 6 per cent.

The decision, therefore, cannot rest either on the Act of Congress or any effect of the state law of Tennessee, but is based on the argument that the Act of Congress having prescribed a penalty has made the contract itself unlawful, and therefore utterly void, so that the courts can-

not give effect to any part of it. The Chancellor says: "Upon a review of the authorities, I am satisfied that the loan of the money by the Third National Bank was in direct violation of the act creating the bank, and that the contract is void, and that the bank is not entitled to recover the principal and legal interest. The object and purpose of the law was to prevent the taking of usurious interest, and it is the duty of the courts to enforce it."

The fact that Congress has prescribed a penalty for the act complained of, viz., forfeiture of all interest, and that the effect of the decision is to judicially enlarge the prescribed penalty, does not seem to have been urged upon the court.

NATIONAL BANKS.—TAXATION OF SHARES.—The Supreme Court of Missouri, in the case of *Lionberger* v. *Rouse* (October 1868), decides that the shares of stockholders in national banks are taxable under the state law of Missouri of February 4th 1854. The mode of taxing the shares being substantially that prescribed by the Act of Congress, the fact that the Missouri statute was passed before the Act of Congress is unimportant. A more doubtful question, however, was whether the law made any discrimination against the national banks in the rate of tax. By section 41 of the Act of Congress of June 3d 1864 the state may tax shares in national banks, provided the tax "shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state," &c.

By statute of Missouri the state banks, prior to the establishment of the national banks, were subject to a certain rate of tax upon the capital stock paid in, which rate could not be increased. *This rate was less than the tax now in question* assessed upon the national bank *shares*. In 1863 the Missouri legislature passed an act allowing the state banks to surrender their charters and reorganize under the National Bank Act. All the banks availed themselves of this privilege but two, which still continue under the state law of 1857. The question was whether the taxation of these two banks at a lower rate on the *capital paid in* than the rate levied on *shares* of national banks was a discrimination against the latter, within the prohibition of the Act of Congress. The court held that it was not. "But it is further said, and it is unquestionably the strong argument on this branch of the case, that the tax cannot be sustained, because it is higher than the rate paid by the two state banks (the Exchange and the Mechanics'), existing under the Act of 1857. And to enforce this view, it is contended that they are the only banks in the state within the proper and legal meaning of the term. This is predicated on the hypothesis that an institution is not strictly a bank without it issues or circulates currency. This, I think, is a mistake. In commercial law a bank is regarded as simply a place for the deposit of money. It is an institution, though generally incorporated, yet it need not be, which is authorized to receive deposits of money, to lend money, and when empowered by charter, to issue notes. It may perform one or all of these functions. Banks may be, and are organized under the authority of the state without any power to issue notes of circulation.

"The proviso in the 41st section of the National Banking Act, imposing a limitation on the power of the states, declares that the tax upon the shares of the associations shall not exceed the rate imposed upon

the shares of the banks organized under state authority. No peculiar or particular banks are described, and it is just to infer that Congress did not use the word in any restrictive sense, but left it to include all moneyed associations, savings and banking institutions. There are many of these banks chartered by the state, some of them with capital perhaps exceeding in amount the capital of the banks in issue, and with privileges just as valuable, with the exception of the power to emit paper. They are banks to all intents and purposes, and their shareholders are all taxed at the same prescribed rates as the shareholders in the national associations. There is, then, no discrimination or distinction made between the two classes of shareholders.

"That the two banks which have retained their distinctive state organizations are taxed to a less amount according to their contract, cannot in the least alter the case. They create no repugnance whatever. They are exceptional cases, and not within the rule, spirit, or intention of the Act of Congress. It can never be tolerated, the idea cannot for a moment be entertained, that because two banking institutions choose to rely on their charter and avail themselves of a special privilege guaranteed to them, that therefore Congress ever contemplated that the whole moneyed capital of the state should be secured in a like exemption."

TAXATION OF NON-RESIDENT HOLDERS OF NATIONAL BANK SHARES.—LAW OF MASSACHUSETTS.—The legislature of Massachusetts having passed an act (June 11th 1868), taxing shares of non-resident holders, the Boston Clearing House submitted the question of its validity to counsel, and Hon. Benjamin F. Thomas (late a judge of the Supreme Court of Massachusetts,) has given an opinion (printed in full in Bankers' Magazine for December 1868) that the law is unconstitutional.

PATENT-RIGHT.—HARD RUBBER.—In *Goodyear's Adm'r.* v. *Berry et al.*, in the United States Circuit Court, Southern District of Ohio, the complainant filed a bill alleging an infringement of the reissued patent of Henry B. Goodyear, administrator of Nelson Goodyear, for hard or vulcanized india rubber, in the making of plates for artificial teeth. The principal grounds of defence were:—

1. That the reissued patents to Henry B. Goodyear are void, as not being for the same invention as the original.
2. That the reissues were improperly granted.
3. That no infringement is proved.

LEAVITT, J., delivered (November 14th 1868) an elaborate opinion detailing the facts and history of the invention. The original patent to Nelson Goodyear was for the process of hardening or "vulcanizing" the plastic rubber produced by the process patented by Charles Goodyear. In the reissued patent of Nelson Goodyear's administrator the words "or other vulcanizable gums," are added after the words india rubber, which defendants argued made the reissue for a different and broader invention than the original patent, and therefore void.

The court was of opinion, however, that on a fair construction the reissued patent claimed substantially the same invention as the original, and that the words "or other vulcanizable gums," were merely added from abundant caution to cover the different varieties of india rubber or caoutchouc already known to commerce and more or less adapted to vulcanization.

On the subject of the reissue the court held that the judgment of the commissioner of patents in granting the reissue, though not conclusive of the substantial identity of the invention claimed in the original and the reissue, afforded a strong presumption to that effect, and in this case the court, for reasons above stated, was of opinion that the inventions were the same.

The court held, further, that the infringement was established, and in this part of the opinion discussed the vulcanizing process patented by Edward L. Simpson October 16th 1866, holding that the latter is merely an improved method, requiring the use of Goodyear's method and therefore an infringement of the latter.

EXTRADITION.—In the case of Reno and Anderson, the express robbers, charged with assault with intent to murder, Chief Justice DRAPER, of the Court of Queen's Bench of Upper Canada (since promoted to the presidency of the Court of Appeal of the New Dominion), delivered at Toronto, October 1868, an elaborate opinion, marked with strong common sense and a liberal and statesmanlike view of the Extradition Laws. Of the merits of the numerous technical points as to the authority of the committing magistrate and the regularity of returns, &c., under the laws of Canada, we do not assume to speak; but on the point most strenuously urged, to wit, that the evidence for the prisoner clearly established an *alibi*, the Chief Justice puts his decision with great force and clearness on the true view of the law, that the duty of the magistrate is to inquire whether a case exists which would justify commitment if the crime had been alleged as done in Canada; the weighing of the evidence so as to decide on the prisoners' guilt, is no part of his duty, but of the jury's. The prisoners therefore were held for extradition.

The same remarks will apply also to the cases of Morton and Thompson, before the Court of Common Pleas of Canada, November 27th 1868. The principal point of law urged for the prisoners was, that the warrant issued in the United States after the arrest in Canada, and therefore the depositions on which it issued could not be read as evidence on the proceedings in Canada. The court, however, HAGARTY, C. J., and WILSON, J., delivering opinions, overruled the point, and held the prisoners.

INDIAN MARRIAGES.—In the case of *Jacob Smith* v. *James H. Brown*, in the District Court of the Third Judicial District of Kansas, a question arose as to the validity of Indian marriages. GILCHRIST, J., charged the jury that under the Treaty of 1825 with the Kansas Nation, and the Acts of Congress, the marriage of a white man residing in the Indian country and an Indian woman, according to the customs and ceremonies of the Kansas Nation, was valid, and the descent of lands in the Kansas Indian reservation must be governed by the Indian law.

ACCIDENT INSURANCE.—The case of *Southard* v. *Railway Passengers' Assurance Co.*, decided (July 1868) by Hon. WM. D. SHIPMAN, Judge of the U. S. District Court for Connecticut, acting as arbitrator, presents a question likely hereafter frequently to arise, viz., What is an *accident?*

The company had insured plaintiff against loss from "bodily injuries effected through violent and accidental means," and subject to certain conditions, one of which was as follows: "Provided always, that this