ENGLISH JUDICIARY.—Sir CHARLES JASPER SELWYN, Lord Justice of the Court of Appeal in Chancery, died in August last, and no successor has yet been appointed. The deceased Lord Justice was appointed in February, 1868, on the resignation of Lord Justice ROLT. The appointment was not well received by the profession at the time, but his judgments appear to have displayed more learning and capacity than was anticipated, and his courtesy of manner on the bench appear to have made him many friends.

Sir GEORGE HAYES, Justice of the Queen's Bench, died in November last of apoplexy. He was appointed in 1868, when the number of the Judges of the Queen's Bench was increased to six, and was considered a learned and sound lawyer. As Sergeant Hayes, he was, for many years, considered the wittiest man at the bar.

THE NEW YORK JUDICIARY.—The new Constitution framed by the Convention of 1868, was submitted to the vote of the people in November last, and was rejected. The Judiciary article, however, which was voted on separately, was adopted by a small majority. By this article the present shifting constitution of the Court of Appeals is changed, and a court established consisting of seven judges holding office for fourteen years. This is a great improvement in the judicial organization of the State, but the good work is only begun. The article just adopted provides that in 1873 a vote of the people shall be taken on the question, whether the judges shall not thereafter be appointed by the Governor for good behavior. We trust that the people, and especially the bar, will keep up their interest in the subject until they have secured a return to the system which in times past gave New York a judiciary conspicuous for integrity learning and ability, and which, we believe, all lawyers of all free countries regard as the only system by which the bench can permanently retain its independence, or merit the public confidence. J. T. M.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

COURT OF APPEALS OF NEW YORK.[3]

ADMIRALTY.

Jurisdiction of Cases on the Lakes.—Since the decision (A. D. 1851) in the *Genessee Chief*, 12 Howard, 443, which decided that admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the waters connecting them, the

1 From J. W. Wallace, Esq., Reporter: to appear in 8 Wall. Rep.
2 From Hon. N. L. Freeman, Reporter; to appear in 47 Ill. Rep.
3 From S. Hand, Esq., Reporter; to appear in 40 N. Y. Rep.

previous Act of 1845 (5 Stat. at Large 726), entitled "An Act *extending* the jurisdiction of the District Courts to *certain* cases upon the lakes and navigable waters connecting the same," and which went on the assumption (declared in the *Genessee Chief* to be a false one) that the jurisdiction of the admiralty was limited to tide waters, has become inoperative and ineffectual, with the exception of the clause which gives to either party the right of trial by jury when requested. The District Courts, upon whom the admiralty jurisdiction was exclusively conferred by the Judiciary Act of 1789, can, therefore, take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same upon the high seas, bays, and rivers navigable from the sea: *The Eagle*, 8 Wall.

The court observes, also, that from the reasons given why the Act of 1845 has become inoperative, the clause (italicized in the lines below of this paragraph) in the ninth section of the Judiciary Act of 1789, which confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the District courts, "*including all seizures under laws of import, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas,*" is equally in operative: *Id.*

ASSUMPSIT.

Mistake of Fact.—In an action to recover back money paid under a mistake of fact, it is no defense that the plaintiff had within his reach the means of ascertaining the truth, or that he omitted to use vigilance and care by which the mistake would have been avoided: *Kingston Bank* v. *Ettinge*, 40 N. Y.

Nor is it any defense to such an action, that the defendant cannot be restored to his original position upon paying back the money: *Id.*

The owner of a judgment upon which an execution has been issued, and a sale of personal property made thereunder, may maintain an action to recover back the money received by the sheriff upon the sale, from one to whom it has been paid with such owner's assent under a mistake of fact: *Id.*

Accordingly, when the sheriff, having received an execution issued upon the defendant's judgment, and afterward one upon a subsequent judgment of the plaintiff against the same party, and before the last had run out, but after sixty days had expired as to the first, made a levy upon personal property not sufficient to satisfy both, sold it and paid over the proceeds to the defendant in satisfaction of his prior execution, with the assent of the plaintiff, neither party knowing that that execution had run out before the levy, but supposing the contrary—*Held* (DANIELS, J., *dissenting*), that the latter could recover it back from the former as money paid under a mistake of fact; and this, although either might have easily learned the truth by inquiry of the sheriff, and although the defendant's judgment had been, in consequence of this receipt of the money, cancelled and discharged of record: *Id.*

Confederate States.

License to trade with the Seceding States.—The military authorities of the United States had no power, under the Act of July 13, 1861, to license commercial intercourse between the seceding States and the rest of the United States: The Ouachita cotton case (6 Wallace 521) affirmed: *McKee* v. *The United States*, 8 Wall.

Such trade was not authorized in March, 1864, by regulations prescribed by the Secretary of the Treasury in pursuance of the said Act, but on the contrary, was at that time forbidden by the then existing regulations of the treasury: *Id.*

Even supposing such trade to have been licensed in March, 1864, in pursuance of the Act of July 13, 1861, the license would not have authorized a purchase by a citizen of the United States from any person then holding an office or agency under the Government of the so-called Confederate States; all sales, transfers or conveyances by such persons, being made void by the Act of July 17, 1862:. *Id.*

Constitutional Law.

Taking private property for public use—When allowable—Under that clause in our Constitution which provides for the taking of private property for public use, the use must be such as is public in its character, and not public merely because it is declared to be such: *East St. Louis* v. *St. John*, 47 Ills.

A municipal corporation has not the power to condemn private property for public use for purposes not specifically named in the law, and which is not within the proper scope and meaning of the delegated authority: *Id.*

So where the charter of the city of East St. Louis confers authority on the city to "take private property for opening, altering and laying out any street, lane, avenue, alley, public square, or other public grounds," such delegated authority does not confer the power to condemn property on which to erect a city prison: *Id.*

Taxation of Imports.—Foreign goods sold by the shipper or consignee to a third person, the same being still in the original packages, on a vessel, before her actual arrival at the wharves of her port, and, while owing to permanent shallowness of water, she is at anchor some thirty miles off, outside a bar, where vessels of her class usually anchor and are unloaded by lighters brought alongside, are not protected from State taxation under the clause of the Constitution, which says that "no State shall lay any imposts on *imports*," the risk of the shippers having, under the terms of the purchase, ended when the goods were put on the lighters, the vessel having been within the statutory port, and the custom-house entries and other preceedings having been attended to by the consignees and not by the purchasers. Such a purchaser is not an "importer:" *Waring* v. *The Mayor*, 8 Wall.

CONTRACT. See *Courts.*

COURTS.

Circuit Court of United States—Review by habeas corpus.—In all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded: *Ex parte Yerger*, 8 Wall.

The second section of the Act of March 27, 1868, repealing so much of the Act of February 5th, 1867, as authorized appeals from the Circuit courts to the Supreme courts, does not take away or affect the appellate jurisdiction of this court by *habeas corpus* under the Constitution and the Acts of Congress prior to the date of the last-named Act: *Id.*

First Possession of a Case.—A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party and raising a new question, as to him, along with the old one, as to the former party. The old question is in the hands of the court first possessed of it, and is to be decided by such court. The new one should be by suit in any proper court, against the new party: *Memphis Company* v. *Memphis*, 8 Wall.

A contract by a city corporation with an existing gas company, by which the corporation conferred upon the company the exclusive privilege, for a term of years, and till notified to the contrary, of lighting the city with such public lamps as might be agreed on, and also the right to lay down its pipes and extend its apparatus through *all* the streets, alleys, lanes, or squares of the city, which declared that "*still further* to encourage the company, it would take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city might demand, and such as might be agreed upon by the company and the city corporation"—the company, in consideration of these grants, concessions, and privileges, binding itself to furnish to the city gas at half the price which they charged their private consumers, does not give a right to the gas company, exclusive of the city corporation's right, to subscribe to the stock of a new gas company, whose object was to introduce gas into the same city: *Id.*

Jurisdiction of Supreme Court.—A cause can be removed from a State court into this court under the twenty-fifth section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right, which he asserted it gave him, was denied to him by the State court, provided the record show, either by express averment or by clear and necessary intendment, that the Constitutional pro-

vision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand: *Furman* v. *Nichol*, 8 Wall.

It need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did: *Id.*

The provision in section 12 of the Charter of 1838 of the Bank of Tennessee, "that the bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State," made a contract on the part of the State with all persons, that the State would receive for all payments for taxes or other moneys due to it, all bills of the bank lawfully issued, while the section remained in force. The guaranty was not a personal one, but attached to the note if so issued, as much as if written on the back of it. It went with the note everywhere, as long as it lasted, and although after the note was issued, section 12 was repealed: *Id.*

Section 603 of the Tennessee code of 1858, which enacted that besides Federal money, controllers' warrants and wild-cat certificates, the collector should receive "such bank notes as are current and passing at par," did not amount to a repeal of the above quoted 12th section; the words of the code having no words of negation, the two enactments being capable of standing together, and implied repeals not being to be favored: *Id.*

This decision does not apply to issues of the bank while under the control of the insurgents: *Id.*

Criminal Law.

Murder—Jury judges of the law and fact.—Under our statute, juries in criminal cases are judges of the law, as well as of the fact, and they have the right to pronounce upon the law as it may seem, in their opinion, to be: *Adams* v. *People*, 47 Ills.

While the doctrine is, that a man threatened with danger must determine from appearances, and the actual state of things surrounding him as to the necessity of resorting to self-defense, and if he acts from reasonable and honest convictions, he will not be held responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken; at the same time, he has not the right to provoke a quarrel and take advantage of it, and then justify the killing of the party with whom he has provoked the quarrel: *Id.*

Where a party on trial upon the charge of murder defends upon the ground that he acted in self-defense, evidence that the deceased had a bowie-knife inside of his coat only a short time before the killing, and that he declared he would cut the accused's heart out with it, would have no weight with the jury, it not being shown the prisoner knew the fact, or acted upon the suspicion of its existence,

and it appearing the deceased had no evil designs toward the accused, but rather that the latter sought the difficulty in which the killing occurred: *Id.*

And in such a case, the dying declaration of the deceased, that he did not wish the accused hurt for what he had done, and that accused had done nearly right, affords no evidence of anything more than a Christian spirit of forgiveness toward one who had done him great wrong, and a new trial would not be granted for the purpose of enabling the accused to prove such declaration upon the ground that it was newly discovered evidence: *Id.*

DEEDS.

Recording Acts—Subsequent Purchaser.—Under the recording acts of Illinois, which enact that deeds shall take effect as against creditors and subsequent purchasers from the time that they are filed of record, it is necessary, in order to defeat a subsequent purchaser for value of an unrecorded title, that he have notice of the previous conveyance, or of some fact sufficient to put a prudent man upon inquiry: *Wills* v. *Smith*, 8 Wall.

A recital in the record of another deed, made seventeen years after a first one unrecorded, between the original grantor and the heir-at-law of the original grantee—the grantor having already sold to a second purchaser whose deed is recorded—that a sale had been made to such original grantee, but no deed given, or if given, lost, is not constructive notice to a third purchasing of such second grantee: *Id.*

If either such second grantee, or purchaser from him, have been a purchaser in good faith, without notice, then such purchaser is protected: *Id.*

Courts of the United States are not bound to give instructions upon specific requests by counsel for them. If the court charge the jury rightly upon the case generally, it has done all that it ought to do: *Id.*

EXECUTION. See *Assumpsit.*

FALSE IMPRISONMENT.

Arrest by Private Citizen.—An arrest by a private individual is excused only where a felony has *in fact* been committed and there was reasonable ground to suspect the person arrested of its commission, although in truth innocent; but a constable is justified in making an arrest without warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been, and acts in good faith, and without evil design: *Burns* v. *Erben*, 40 N. Y.

Where there is no conflict in the evidence as to the circumstances in actions for false imprisonment and malicious prosecution, the question of probable cause or reasonable ground of suspicion is one of law and not for the jury: *Id*

FIXTURES.

Where machinery is actually annexed to the land, it will be presumed to have been so attached with a view to the permanent improvement, or beneficial enjoyment of the freehold, and will be deemed a fixture and part of the realty, in the absence of proof that the attachment was merely for the purpose of steadying and adjusting the machine, or that the intention at the time existed, not afterward abandoned, that the annexation should not be permanent in its character, or that there is some agreement or relation of parties inconsistent with the supposition that a permanent annexation was intended: *Porter* v. *Cromwell*, 40 N. Y.

In determining the question, whether a particular article is a fixture or not, the intention of the party who attached it to the realty is an important element to be considered: *Id.*

Murdock v. *Gifford* (18 N. Y. 28), and *Ford* v. *Cobb* (20 N. Y. 344), distinguished: *Id.*

The definition of what constitutes a fixture, contained in *Teaff* v. *Hewitt* (1 Ohio, N. S., 511), approved. DANIELS, J.: *Id.*

HABEAS CORPUS. See *Courts*.

HIGHWAYS.

Plank Roads—Plank roads are undoubtedly public highways, and differ from common highways only in the mode of construction and the taking of tolls, and on the payment of the latter travelers have the same right to use them they have to use other highways: *Craig* v. *People, ex rel. Nevill*, 47 Ills.

Where a plank road has been used for a number of years by the public, and the company have used a portion of a public highway as their roadway, causing the public road to be closed up to divert travel to their road, they cannot close up their road against the public: *Id.*

The provisions of the statute in relation to the selling of plank roads to counties, on the expiration of the charter of the road, does not confer any authority on the company to close up such road until the county purchases: *Id.*

Where the company forfeit their charter, or abandon it, or suffer the road to so become out of repair as to amount to an abandonment, the right of way of the company ceases, and the road becomes a common highway: *Id.*

So, where the lessees or assignees of a company publish a notice, that owing to the bad condition of the road, the high price of materials and labor, they cannot profitably keep up the road at the prescribed tolls, and that unless the county bought their entire interest to roadway, bridges, plank, toll-gates, etc., the road would be closed up as private property—*Held*, that such notice was, in effect, an abandonment of the road, and that it became a common highway: *Id.*

HOMESTEAD.

Abandonment.—The owner of a homestead, and occupying the same as such, and located at Zenia, in Clay county, Illinois, on the

25th of April, 1863, removed with his family to Nebraska; on the 23d of July, 1864, he returned to Salem, Illinois, where he has since resided. In the meantime, on the 16th of October, 1863, an execution was issued on a judgment obtained against the owner, and directed to the sheriff of Clay county, who levied the same upon the premises at Zenia, so claimed as a homestead, and on the 15th of December, 1863, sold the same under the execution—*Held*, this was an abandonment of the homestead, and it thereby became liable to levy and sale under execution: *Maher* v. *McConaga*, 37 Ills.

Husband and Wife.

Contracts Between.—It is the rule of the common law that contracts between husband and wife are void, and will not be enforced by the courts: *Sweeney et ux.* v. *Damron et al.*, 47 Ills.

But where such contracts have been made in good faith, and are executed, they are valid: *Id.*

So, where a husband has received money belonging to his wife, and invests it for her in her name, or has property bought by her money, conveyed to her, courts of equity will treat the transaction as fair, and sustain it against subsequent creditors of the husband chargeable with notice: *Id.*

And where, not being in debt, with a view of making provision for his wife, property is bought with his own means, and conveyed to her, or to trustees for her use, the transaction will be sustained: *Id.*

If the husband is in debt, as to his creditors existing at the time of such transaction, they would be fraudulent, unless such creditors are satisfied subsequently: *Id.*

The wife may intrust means which she inherits, since the Act of 1861, to her husband to loan or invest, and it will be protected in his hands to the same extent the money of a stranger would under like circumstances: *Id.*

Where the legal title to lands, purchased with the means of the wife, is in the husband, and he exchanges these lands for others, and has the deeds of the latter made to his wife, equity will uphold the title of the wife, as against creditors not misled by the title standing in the husband: *Id.*

Negligence. See *Railroad.*

Practice.

Where a question is asked of a witness, which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury, and is not error of which a revising court can take notice: *Nailor* v. *Williams*, 8 Wall.

If it does work the objecting party injury, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of the sort mentioned: *Id.*

Where there is nothing in the bill of exceptions which enables a revising court to say that questions objected to have exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, no error is shown: *Id.*

RAILROADS.

Diligence Required.—Railroads and private individuals, with respect to the same subject matter, are held to the exercise of the same degree of diligence in preventing injury to others: *O. and M. R. R. Co.* v. *Shanefelt*, 47 Ills.

It is not negligence *per se* for a railroad to suffer grass and weeds to accumulate on its right of way; the fact, however, is proper evidence for the injury, who may find negligence from it: *Id.*

Land owners contiguous to railroads are as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies are; so where a fire is ignited on the company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss: *Id.*

And unless it appears that the negligence of the company is greater than that of such land owner, the latter cannot recover for injuries thus arising: *Id.*

SALE.

Possession by Vendor—In sales of personal property, where the vendor at the time has possession, a warranty of the title is implied: *Burt* v. *Dewey*, 40 N. Y.

The plaintiffs sold to F. a yoke of oxen, and it was agreed that the oxen were to remain the property of the plaintiffs until they should be paid for by F., the latter in the meantime having possession. F. afterward, and before he had paid for them, sold the oxen to the defendant, who paid a full price and bought in good faith, without notice of the plaintiff's rights—*Held* (JAMES and MURRAY, JJ., *contra*), that the defendant acquired no title as against the plaintiffs: *Ballard* v. *Burgett*, 40 N. Y.

Wait v. *Green* (36 N. Y. 556), distinguished: *Id.*

TRUSTS AND TRUSTEES.

Investments by.—The law, in this State, imposes upon trustees, holding trust funds for investment for the benefit of minor children, to be supported from the income accruing therefrom, the duty of placing them in a state of security, of seeing that they are productive of interest, and of so keeping them that they may always be subject to future recall, for the benefit of the *cestui que* trust: *King* v. *Talbot*, 40 N. Y.

In this State, a trustee holding funds for investment for the benefit of minor children, must invest in government or real estate securities. Any other investment would be a breach of duty and the trustees personally liable. MURRAY, GROVER, DANIELS, and JAMES, JJ. Contra, HUNT, Ch. J., MASON and LOTT, JJ.: *Id.*

UNITED STATES.

Extra Pay to Salaried Employee.—The Act of August 23d, 1842, declaring that no officer of the Government drawing a fixed salary, shall receive additional compensation for any service, unless it is authorized by law, and a specific appropriation made to pay it, is not repealed by the twelfth section of the Act of August 26, the same year: *Stansbury* v. *United States*, 8 Wall.

An agreement by the Secretary of the Interior to pay a clerk in his department for services rendered to the Government by labors abroad—the clerk still holding his place and drawing his pay as clerk in the interior—was, accordingly, held void: *Id*

Contracts by the Executive—War Department.—The war department, by its proper officers, may make a valid contract for the slaughtering, curing and packing of pork, when that is the most expedient mode of securing any supplies of that kind: *U. S.* v. *Speed*, 8 Wall.

Such a contract, when for a definite amount of such work, is valid, though it contains no provision for its termination by the Commissary General at his option: *Id.*

The Act of March 2d, 1861, requiring such contracts to be advertised, authorizes the officer in charge of the matter to dispense with advertising when the exigencies of the service requires it, and it is settled that the validity of a contract, under such circumstances, does not depend on the degree of skill or wisdom with which the discretion thus conferred is exercised: *Id.*

Where the obligation of one party to a contract requires of him the expenditure of a large sum in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the first to comply with his agreement: *Id.*

Where the defendant agreed to pack a definite number of hogs for the plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, the measure of damages is the difference between cost of doing the work and the price agreed to be paid for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk and responsibility attending its full execution: *Id.*

WATERS AND WATER-COURSES.

Interference with Natural Channel.—Equity will interpose, by mandatory injunction, to compel the restoration of running water to its natural channel, when wrongfully diverted, at the suit of the party whose lands include either the whole or a part of such channel: *Corning et al* v. *Troy Iron and Nail Factory.* 40 N. Y.

The grounds for equitable interposition in such a case are twofold: First, the inadequacy of any legal remedy to secure the party in the enjoyment of his right to have the water flow in its natural channel. Second, to prevent a multiplicity of suits for damages accruing from the daily and continuous wrongful diversion of the stream: *Id.*