learness and force of argument, and, in its general tendency and onclusion, sustains the views already expressed. In consequence f my high respect for the opinion of his excellency the governor, nd for that of his legal adviser, I approached the result to which I arrived with hesitation, and at first with a feeling of diffidence as :o the correctness of my deductions. The proposition presented :or solution was novel, and the executive action was obviously oased on motives of justice and considerations of general utility. A pressing evil seemed to call for an immediate remedy, and the mistake was that an erroneous one was adopted. It was a mere mistake of form, and the mistake leaned to the side of right. Full reflection, however, has removed all doubt from my mind, and in the discharge of my duty, I am bound to say that the executive act in question was not authorized by the law of this state.

Judgment for defendants.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[2]

SUPREME COURT OF KANSAS.[3]

Accord and Satisfaction.

Full Payment.—Where the answer sets forth that a certain contract was assigned to the plaintiff in full payment and satisfaction of a certain note sued on, it is immaterial how much was due on the contract: *Luke* v. *Johnnycake*, 10 Kans.

Advancement. See *Contract.*

When a father loans money to his son and takes his note for the same, his oral declaration that he will not collect the same, but let the son have it at his death, does not change the transaction into an advancement which the father cannot recall: *Denman* v. *McMahin*, 37 Ind.

Arbitration and Award.

Errors in Award—Reformation of.—Where an award for a gross sum embraces matters not within the submission, or is for a wrong sum by reason of a mistake in computation, if it can be ascertained how much was allowed on what was, and how much on what was not within the submission, or if the mistake in computation can be ascertained, the award may properly be recommitted to the referee for correction, and

[1] From J. B. Black, Esq., Reporter; to appear in 37 Ind. Reports.

[2] From J. M. Shirley, Esq., Reporter; to appear in 52 N. H. Reports

[3] From W. C. Webb, Esq., Reporter; to appear in 10 Kans. Reports.

when corrected, judgment will be rendered upon it: *Yeaton* v. *Brown*, 52 N. H.

Attorney.

Set-off—Agency.—An attorney, when sued for money collected for the plaintiff, may set off a note held by him, executed by the plaintiff. There is nothing in the doctrine of agency that forbids such a defence: *Noble* v. *Leary*, 37 Ind.

Bankruptcy.

Discharge not questionable in State Court.—A discharge in bankruptcy, under the U. S. Act of 1867, cannot be impeached in a state court, on the ground that the bankrupt, in his proceedings in the U. S. court to obtain said discharge, was guilty of wilfully concealing part of his estate: *Parker* v. *Atwood*, 52 N. H.

Bills and Notes.

Consideration paid by Endorsee—Endorsement without Liability—Mistake.—In an action on a promissory note brought by an endorsee against his endorser, the complaint alleging the insolvency of the maker and the non-payment of the note, it is not necessary to state the amount paid for the purchase of the note, as, *primâ facie*, the face of the note fixes the sum to be recovered: *Lee* v. *Pile*, 37 Ind.

In such an action, an answer that the note was exchanged with the plaintiff for certain property delivered to the defendant, and that he delivered the note to the plaintiff, and then, at his request, and solely for the purpose of parting with any apparent title thereto, he endorsed the same, is no defence to the action, as it does not allege that the plaintiff agreed to take the note without endorsement. The additional averments, that it was expressly agreed that the plaintiff should accept the note under the contract, for the property delivered to the defendant, and should rely on the maker for payment, who was the owner of large property; and that the defendant, being ignorant of the law governing his liability, endorsed the note simply to transfer his ownership, and that it was no part of the agreement that he should be liable as an assignor thereof, and that the words "without recourse" were, by mistake, omitted in making said endorsement, are not sufficient to render the paragraph good, as they contradict the written contract of endorsement: *Id.*

Contract. See *Corporation.*

Illegal Consideration.—Where any part of the consideration of a contract is illegal, that may vitiate the whole contract; but where a part of the consideration of a contract with one party is a contract of the other party, which is void or voidable, but not illegal, that does not taint the whole consideration, or make void what would otherwise be valid: *Clements* v. *Marston*, 52 N. H.

Executory Promise—Consideration.—The promise of a father to give up to his son certain notes executed by the latter to the former is executory; and natural love and affection is not a sufficient consideration to support the promise. Nor can it be supported as an advancement of the sum for which the notes were taken: *Denman* v. *McMahin*, 37 Ind

Intoxication—Ratification.—In a suit upon a mortgage, it is a good defence, that the defendant was so intoxicated, at the time of signing the same, as to be incapable of executing it; and a reply that he retained the goods for which the instrument was given, and used them, is bad, as the action is not on a claim for goods sold, but on the written promise, and the reply shows no ratification of that act: *Reinskopf* v. *Rogge*, 37 Ind.

In such case, an instruction to the jury, that "if the defendant, at the time of the execution of the mortgage, as a result of drunkenness, or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover," is a correct statement of the law: *Id.*

Corporation.

Subscription to Stock—Contract.—A subscription for stock in a railroad corporation is a contract between the subscriber and the corporation: *Melvin* v. *Hoitt*, 52 N. H.

Debtor and Creditor. See *Decedent's Estate.*

Collateral Security—Execution against Property pledged.—Any person may, if he chooses, pledge his personal property as collateral security for the payment of a debt, and make it liable for the payment of such debt notwithstanding such property would otherwise be exempt by law from seizure or sale on execution, attachment or any other legal process: *Jones* v. *Scott*, 10 Kans.

After personal property has been pledged as collateral security for the payment of a debt and the debt has become due, the creditor may sue the debtor and recover a judgment against him for the amount of the debt without destroying or in the least affecting his lien on the property pledged: *Id.*

Where personal property otherwise exempt from execution has been pledged as collateral security for the payment of a debt and judgment has been rendered on the debt, an execution may be issued and the property seized and sold thereon as in other cases: *Id.*

Decedent's Estate.

Creditor—Executor de Son Tort—Liability.—A creditor of a decedent's estate must proceed to enforce his claim against the estate through an executor or administrator, and cannot sue the heirs, devisees and legatees, where there has been no administration: *Wilson* v. *Davis*, 37 Ind.

If any one has, without an administration, though he be a legatee under a will, taken possession of any of the property of a decedent, he may be sued as an executor *de son tort*, by an unpaid creditor: *Id.*

Deed.

Priority—Valuable Consideration.—Under the laws of 1859 priority over an unrecorded deed could be claimed only by a purchaser for a valuable consideration: *Coon* v. *Browning*, 10 Kans.

Where a deed is executed and five days thereafter the patent is assigned, the deed transfers the title and the assignment passes nothing: *Id.*

EQUITY.

Mistake—Misdescription of Land.—Where land has been sold, and the purchaser put into possession, and the purchase-money paid, but an erroneous description of the land has been carried through the bond for a deed into the deed itself, and perpetuated through subdivisions of the land, and re-sales, in all cases possession being given and the purchase-money paid, equity will grant relief and correct the misdescription upon proper proof. But when, during the transfers, a judicial sale intervenes, and the error is carried into the judgment, the advertisement, the appraisement, the sale, and the sheriff's deed, equity cannot give relief by ordering a correction of the description of a subdivision, at the suit of the purchaser at the sheriff's sale, or those claiming under him: *Rogers* v. *Abbott et al.*, 37 Ind.

ERROR.

Errors not prejudicing the Defendant no Ground for Reversal.—An instruction which the special findings of the jury plainly show could not have prejudiced the defendant, is not cause for reversal, even though it be erroneous: *Luke* v. *Johnnycake*, 10 Kans.

The action was to recover the amount of two notes; the court directed the jury, if they found for the plaintiff, to find how much was due (if anything) upon each note. Disregarding this direction the jury found in the aggregate the amount of both notes. This was error, but as it did not prejudice the defendants it was not cause for arresting the judgment: *Id.*

This court will not reverse a judgment because the verdict seems against the weight of the evidence, unless the preponderance is great; much less, where the evidence is nearly balanced or inclining in favor of the verdict: *Id.*

ESTOPPEL.

Good Faith.—A party invoking the aid of the doctrine of estoppel to deprive the real owner of his property must himself act in good faith: *Bernstine* v. *Smith*, 10 Kans.

EVIDENCE.

Admissions.—The admissions of a party may be given in evidence against him, whether connected with any act done or not. These declarations cannot be introduced in his favor: *Denman* v. *McMahin*, 37 Ind.

Where it is necessary for the defendant to show the payment of taxes by him, the admission of a tax receipt is proper, although it does not show who paid the money, as this proof may be supplied by other evidence: *Id.*

Delivery of Checks to Company—Evidence tending to show Receipt of Baggage.—Proof, that a passenger riding on a through ticket from New York City to Junction City by way of the Hannibal and St. Joseph Railroad and the Kansas Pacific Railway, delivered at Kansas City to the baggage master of the Kansas Pacific Railway Company, who was agent for both railroad companies, certain checks of the Hannibal and St. Joseph Railroad Company for baggage belonging to said passenger, with the understanding and agreement that the Kansas Pacific Railway Com-

any should forward said baggage from Kansas City to Junction City, ; some evidence tending to show that the said Kansas Pacific Railway ompany received said baggage, and is therefore competent evidence to c to the jury for that purpose, along with the other evidence in the ase tending to prove the same thing: *K. P. R. W. Company* v. *Montell*, 0 Kans.

EXECUTOR. See *Decedent's Estate.*

FENCES. See *Railroad.*

Damage to Crops for Want of Sufficient Fence—Assessment of Damages.—In a township in which the hog law has not been suspended, it is no defence to an action for damages done to a crop by hogs suffered to run at large that the crop is not enclosed by a legal and sufficient fence: *Wells* v. *Beal*, 10 Kans.

In such case there is no necessity of applying to the fence-viewers for a certificate and assessment of damages: *Id.*

HIGHWAY.

Vacation—Liability of County.—Where the county commissioners of a county vacate a county road, the county is not liable in damages to any person who may sustain some loss in consequence thereof: *Commissioners of Coffey Co.* v. *Venard*, 10 Kans.

City—Improvement of Alley—Dedication.—Where an injunction was sought to restrain the city of Evansville from improving what was claimed by the city as an alley, it was answered, that the owners of the property, subject to the plaintiff's life estate, on both sides of the alley, had laid out and opened the same to correspond with the other alleys of the city, with the consent of the plaintiff, and, in 1858, had laid off lots on their grounds abutting on said alley, and described said lots as extending to the same, in deeds and conveyances; and that, with full knowledge of the plaintiff and the owners, said alley had been used by the public, exclusive of the use by the owners. *Held*, that the answer was sufficient as showing a dedication to the public use; and that such facts could not be introduced under the denial, but must be averred by answer: *City of Evansville et al.* v. *Evans*, 37 Ind.

Dedication of property to a highway may be shown by acts *in pais*, and lapse of time is not important under such circumstances: *Id.*

HUSBAND AND WIFE. See *Witness.*

LIMITATIONS, STATUTE OF.

Absence from the State—Insolvency—Discharge by Laws of another State.—The Statute of Limitations runs against a claim, unless the debtor is both absent from and residing out of the state: *Bell* v. *Lamprey*, 52 N. H.

He may have his legal residence out of the state, and yet be present in the state within the meaning of that provision: *Id.*

During every absence of the debtor from the state, whether temporary or permanent, which is such that the creditor cannot, during the same, make legal service upon him, the Statute of Limitations will not run: *Id.*

But during any return to or presence in the state of the debtor,

whether permanent or temporary, with the knowledge of the creditor, or so open and notorious, and of such continuance as to amount to notice to him, and such that the creditor might, by ordinary diligence, have obtained service upon him, the Statute of Limitations will run: *Id.*

To a plea of discharge in insolvency in another state, the plaintiff replied that the defendant committed perjury in swearing to his schedule; and, also, that within a year before filing his petition, and being and knowing himself to be insolvent, paid, in part, borrowed money and pre-existing debts and liabilities, and that he procured the assent of creditors to his discharge by a pecuniary consideration, and made an assignment and transfer of property, in contemplation of insolvency in fraud of creditors, &c.;—upon demurrer,—*held*, that these replications were bad, because they did not specify time, place, persons and circumstances, when, where, with whom, and under, and in connection with which the acts charged were committed and done: *Id.*

OFFICER. See *Process.*

PARTNERSHIP. See *Surety.*

PLEADING. See *Limitations. Surety.*

Demurrer—Defects in substance.—While the general rule is, that where a demurrer is interposed, judgment must be rendered against the party whose pleading is first found defective,—this applies only to defects in substance, as all defects of form, such as duplicity and surplusage, are waived and cured by pleadings over: *Bell* v. *Lamprey*, 52 N. H.

It must also be a substantial defect in the line of pleadings in which the demurrer is interposed, and not in some other line of pleading which has resulted in an issue of fact, or some defect that might have appeared had the pleading been different: *Id.*

Unsound Mind.—A complaint sought relief from a transaction between the plaintiff and defendant, made when the former was of unsound mind, and there was no averment of a restoration to soundness of mind. *Held*, that the court would presume the want of capacity to continue, but that this objection to the complaint would be considered waived unless the want of capacity to sue were presented by demurrer or answer: *Wade* v. *The State, ex rel. Nix*, 37 Ind.

PROCESS.

Protection to Officer.—Process regular on its face, issued from a court having jurisdiction of the subject-matter, protects an officer in executing it: *Wickersham* v. *Corlew*, 10 Kans.

Such protection may also be claimed by any persons summoned by the officer to assist him in executing it: *Id.*

The plaintiff in the proceeding is not, however, protected by the regularity of the process, he must show a regular and valid judgment: *Id.*

RAILROAD. See *Evidence.*

Fencing—Liability.—Where the streets and alleys of a town end at a railroad track, and terminate at a high bank, which cannot be used for loading or unloading cars, it is the duty of the railroad company to fence; and it is liable for injury to cattle when it does not fence, without regard to the negligence of the owner of the animals: *T. W. and W. Railway Co* v. *Cary*, 37 Ind.

Replevin.

Judgment.—In a replevin suit, where the verdict is in favor of the plaintiff and it does not appear that he has already obtained the possession of articles in controversy, the judgment should be entered in the alternative for the recovery of the possession, or, in case a delivery cannot be had for the value thereof: *Ward* v. *Masterson*, 10 Kans.

Where the verdict is in favor of the plaintiff for some of the articles claimed and in favor of the defendant for the remainder, and it does not appear that defendant's possession of any has been disturbed, the defendant is entitled to no judgment, and is not prejudiced by a failure to assess the value of the articles found to be his, or damages for taking and withholding them: *Id.*

Where the verdict assesses the value of articles replevied at a sum greater than that alleged in the petition, and no amendment of the petition is made or asked, the judgment should be entered only for the sum stated in the petition: *Id.*

Stream.

Alveus—Title to Soil—Priority of Occupation of Water.—The soil of the *alveus* of a river in which there is no tidal effect belongs to the adjacent riparian proprietors, the ownership of each extending *usque ad medium filum aquæ*, where the opposite banks belong to different persons: *Norway Plains Co.* v. *Bradley*, 52 N. H.

An encroachment on the *alveus* of a running stream may not be complained of without the necessity of proving that essential damage has been sustained or is likely to be sustained therefrom: *Id.*

No priority of occupation or use of water by a mill-owner upon a stream affects the right of a riparian proprietor above, to a reasonable use of the water flowing over his own land, by making improvements thereon, even to the extent of erecting a solid building upon the *alveus* of a stream, thereby diminishing the width of the current, unless such encroachment sensibly and injuriously affects the rights of such mill-owner: *Id.*

Street. See *Highway.*

Surety.

Indemnifying Bond—Fraudulent Representation—Guarantee.—In an action upon a bond given with surety by one partner to another to indemnify the latter against the partnership liabilities, false and fraudulent representations as to the amount of these liabilities, made to the surety for the purpose of inducing him to execute the bond by the partner to whom the bond was given, it was *held*, would constitute a good defence to the action against such surety. Such representations, without an averment of fraud, will not be sufficient in pleading. Nor will an answer that the party receiving the bond guaranteed that the firm liabilities should not exceed a certain sum be sufficient, no guarantee being contained in the bond: *Fishburn* v. *Jones*, 37 Ind.

Taxation.

Savings Banks—Double Taxation.—Under the statute of 1869, ch. 4, all the deposits and accumulations in the several savings banks in this state, however such deposits and accumulations may be invested, are to

be taxed to the banks; and such taxes are to be paid to the state, in the first instance. And such deposits, &c., are not liable to any other tax: *Rockingham Ten Cent Savings Bank* v. *Portsmouth*, 52 N. H.

Real estate owned by a savings bank, and purchased with the deposits and accumulations of the bank, is not, under said statute, subject to taxation as real estate in the place where the same is located: *Id.*

A fundamental principle in taxation is, that the same property shall not be subject to a double tax payable by the same party: *Id.*

Thus, when it is decided that a certain class or kind of property is liable to be taxed under one provision of the statute, it follows, as a legal conclusion, that the legislature could not have intended that the same property should be subject to another tax: *Id.*

VENDOR AND PURCHASER. See *Equity.*

Covenant—Evidence—Damages.—In an action for breach of a covenant of seisin, where the complaint alleged that the title to the land described in the deed was in the United States; *Held*, that the deposition of a register of the land office of the district in which the land lay was competent evidence to prove the title: *Lacey* v. *Marman*, 37 Ind.

The measure of damages on the breach of the covenant of seisin, where the grantee receives no title, is the consideration money paid, with interest, or if land be paid by way of exchange, the value of that land: *Id.*

WITNESS.

Husband and Wife.—Under our statutes neither interest nor infamy is any disqualification as a witness, whether as a party or otherwise: *Clements* v. *Marston*, 52 N. H.

Nor are those disqualifications any longer operative, which, being founded upon grounds of public policy, such as the fear of producing dissensions and strife in families and encouraging perjury, were held at common law sufficient to exclude husbands and wives from testifying for or against each other in all cases: *Id.*

Instead, therefore, of the common-law rule that the wife could not testify for or against her husband, and *vice versa*, for the double reason that their interests were identical, and that it was also contrary to sound public policy, the rule in this state now is that husband and wife may elect and be compelled to testify for or against each other in all cases where the court can see that their examination as witnesses upon the points to which their testimony is offered will not lead to a violation of marital confidence: *Id.*

Therefore, when one party to a suit is an executor or administrator, and does not elect to testify, although the other party is thus precluded from being a witness, yet his wife may be called as a witness, either for or against her husband, where no violation of marital confidence is involved: *Id.*

Conversations between the husband and third persons, and which were heard by the wife, would not ordinarily come within this exception: *Id.*

And when the wife acted as the agent of the husband, in a matter requiring no special confidence, and where no such confidence is bestowed and where any other person could have acted just as well, she may ordinarily state any facts learned in the course of such agency: *Id.*