will be solvable in treasury notes. And it is also held that the legal tender acts are constitutional as applied to transactions since their passage.

9. In *Trebilcock* v. *Wilson*, it is decided that a debt created before the passage of the legal tender acts, and solvable by express terms "in specie," cannot be discharged by the tender of the nominal amount due in treasury notes.

ISAAC S. SHARP,
Philadelphia.

RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.

WALSH v. THE PEOPLE OF ILLINOIS.

A proposal by an officer to receive a bribe, though not bribery, is an indictable misdemeanor at common law.

THE defendant below was an alderman of the Common Council of the city of Chicago. As such he was indicted for a proposal made by himself to receive a bribe, to influence his action in the discharge of his duties.

The opinion of the Court was delivered by

THORNTON, J.—The indictment is in form an indictment at common law; and it is conceded that the statute has not created such an offence against an alderman. Our criminal code has made it an offence to propose or agree to receive a bribe on the part of certain officers, but an alderman is not, either in terms or by construction, included amongst them: Rev. 1845, p. 167, sec. 87. It is contended that the act charged does not fall within any of the common law definitions of bribery; that no precedent can be found for such an offence; and that as propositions to receive bribes have probably often been made, and as no case can be found in which they were regarded as criminal, the conclusion must follow that the offence charged is no offence. The weakness of the conclusion is in the assumption of a premise which may or may not be true. This particular phase of depravity may never before have been exhibited; and if it had been, a change might be so suddenly made by an acceptance of the offer, and a concurrence of the parties, as to constitute the offence of bribery, which consists in the

receiving any undue reward to incline the party to act contrary to the known rules of honesty and integrity.

But the character of a particular offence cannot fairly be determined from the fact that an offence exactly analogous has not been described in the books. We must test the criminality of the act by known principles of law.

At common law, bribery is a grave and serious offence against public justice, and the attempt or offer to bribe is likewise criminal.

A promise of money to a corporator to vote for a mayor of a corporation was punishable at common law: *Rex* v. *Plympton*, 2 Lord Raym. 1377.

The attempt to bribe a privy counsellor to procure an office was an offence at common law: *Rex* v. *Vaughan*, 4 Burr. 2494. In that case Lord MANSFIELD said: "Whenever it is a crime to *take* it is a crime to *give*. They are reciprocal. And in many cases, especially in bribery at elections to Parliament, the attempt is a crime. It is complete on *his* side who offers it." Why is the mere unsuccessful attempt to bribe criminal? The officer refuses to take the offered reward, and his integrity is untouched, his conduct uninfluenced by it. The reason for the law is plain: the offer is a sore temptation to the weak or the depraved. It tends to corrupt, and as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community. The attempt to bribe is then at common law a misdemeanor, and the person making the offer is liable to indictment and punishment. What are misdemeanors at common law? Wharton, in his work on Criminal Law, p, 74, says: "Misdemeanors comprise all offences lower than felonies which may be the subject of indictment. They are divided into two classes: first, such as are *mala in se*, or penal at common law: and secondly, such as are *mala prohibita*, or penal by statute. Whatever under the first class mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty when done corruptly, is the subject of indictment."

In the case of the *King* v. *Higgins*, 2 East 5, the defendant was indicted for soliciting and inciting a servant to steal his master's chattels. There was no proof of any overt act towards carrying the intent into execution, and it was urged in behalf of the prisoner that the solicitation was a mere fruitless, ineffectual tempta-

tion—a mere wish or desire. It was held by all the judges tha the soliciting was a misdemeanor, though the indictment contained no charge that the servant stole the goods, nor that any other act was done except the soliciting. Separate opinions were delivered by all the judges. Lord KENYON said: "The solicitation was an act, and it would be a slander upon the law to suppose that such an offence was not indictable." GROSE, J., said: "An attempt to commit a misdemeanor was in itself a misdemeanor. The gist of the offence is the indictment." LAWRENCE, J., said: "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable, and that the mere soliciting the servant to steal was an attempt or endeavor to commit a crime." LE BLANC, J., said: "That the inciting of another, by whatever means it is attempted, is an act done; and if the act is done with a criminal intent, it is punishable by indictment." An attempt to commit an offence, or to solicit its commission, is at common law punishable by indictment: 1 Haw. P. C. 55; Whart. Cr. Law 78 and 872; 1 Russ. on Cr. 49. While we are not disposed to concur with Wharton to the full extent in the language quoted, that every act which might be supposed, according to the stern ethics of some persons, to be injurious to the public morals, to be a misdemeanor, yet we are of opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one, and a solicitation to commit an offence. This, at common law, is a misdemeanor. Inciting another to the commission of any indictable offence, though without success, is a misdemeanor: 3 Chitty Cr. Law 994; 1 Russ on Cr. 49; *Cartwright's Case*, Russ. & R. C. C. 107, note *b*; *Rex* v. *Higgins*, 2 East 5.

As we have seen, the mere offer to bribe, though it may be rejected, is an offence, and the party who makes the offer is amenable to indictment and punishment. The offer amounts to no more than a proposal to give a bribe; it is but a solicitation of a person to take one. The distinction between an offer to bribe and a proposal to receive one, is exceedingly nice. The difference is wholly ideal. If one man attempt to bribe an officer, and influence him to his own degradation and to the detriment of the public, and fail in his purpose, is he more guilty than the officer who is willing to make sale of his integrity, debase himself, and who solicits to be purchased, to induce a discharge of his duties? The prejudi-

cial effects upon society are, at least, as great in the one case as in the other; the tendency to corruption is as potent, and when the officer makes the proposal he is not only degraded, but the public service suffers thereby. According to the well established principles of the common law, the proposal to receive the bribe was an act which tended to the prejudice of the community, greatly outraged public decency, was in the highest degree injurious to the public morals, was a gross breach of official duty, and must therefore be regarded as a misdemeanor for which the party is liable to indictment.

It is an offence more serious and corrupting in its tendencies than an ineffectual attempt to bribe. In the one case the officer spurns the temptation and maintains his purity and integrity; in the other, he manifests a depravity and dishonesty existing in himself, which, when developed by the proposal to take a bribe, if done with a corrupt intent, should be punished, and it would be a slander upon the law to suppose that such conduct cannot be checked by appropriate punishment.

In holding that the act charged is indictable, we are not drifting into judicial legislation, but are merely applying old and well-settled principles to a new state of facts.

We are compelled, however, to reverse upon the evidence, and shall not, therefore, further allude to the law of the case or to the errors assigned upon instructions given and refused.

The defendant was found guilty upon the unsupported testimony of one Goggin, and it appears that there were two persons of the name of Walsh, referred to by Goggin in his numerous conversations—one was a member of the Board of Education, and the other, the present defendant, was a member of the Common Council of Chicago. After the date, as fixed by Goggin, of the proposal on the part of the defendant to receive a bribe, Goggin said to one Young, that he had agreed to give two thousand dollars to Walsh, but that he now demanded four thousand dollars. Young replied, there are two persons of that name, "which one is it?" Goggin said, "It is Walsh of the board of education; the alderman is a gentleman." Goggin complained to one Miller that the defendant had prevented him from selling his lot to the city, and said, "I will get a chance at him some of these days." He also said to Donavan, "Walsh is my bitterest enemy, and I will do everything in my power to send him up." To Cullerton, "I

have nothing against any alderman but Jim Walsh, and by ——, I will fix him if swearing will do it." To Gustave Busse, "All I want is Walsh, the d——d scoundrel, I want to go for him. If I can bring him to the penitentiary, I am going to do it." To Fred. Busse, "There is only one man I want to go for—Walsh. If I get on the stand if I don't fix him and get him in the penitentiary." Upon cross-examination, Goggin denied all hostility, and any expressions of hostility towards the defendant, and he also denied the conversation testified to by Young. We might make further reference to the evidence, but enough has been cited to show a deep feeling of hostility on the part of the witness, towards the defendant, and a determination to have him convicted if false swearing could do it. We must credit the numerous witnesses who contradict the prosecutor. He is therefore impeached, and to a great extent rendered unworthy of belief. He cannot have sworn to the truth, if we believe the impeaching witnesses, or if upon the trial he testified truly then he made wilfully false statements to divers persons before the trial.

Not only is there reasonable doubt created as to the guilt of of the accused, but the mind is forced to the conclusion that the prosecution was the result of personal animosity, and was carried on for the gratification of malicious feeling. There is no safety to the good, or virtuous or innocent, if convictions can be had upon the testimony presented in this record.

In a case involved in so much doubt the good character of the accused, abundantly proved, was entitled to great weight. A large number of witnesses testified that his general reputation for honesty and integrity was good. Under all the circumstances it is almost incredible that a verdict of guilty was obtained.

BREESE, J.—I concur in reversing the judgment, but I do not concur in all the views presented in this opinion.

SCOTT, J.—I concur in reversing the judgment in this case, but dissent from the views expressed in the opinion of the majority of the court.

There is no statute in this state which defines the offence for which the plaintiff in error was indicted and convicted. It is a common-law indictment, and it was sought to charge him with having in his official capacity offered to receive a bribe. The in-

dictment alleges that the plaintiff in error, "on the 1st day of December 1871, then a member of the common council of the city of Chicago, to wit, an alderman, did then and there unlawfully, wickedly, corruptly, and contrary to his duty as such alderman, propose to receive as a bribe of and from William Goggin, a large sum of money, to wit, the sum of $4000, to induce him, the said Walsh, as such alderman, to use his influence with favor as such alderman, to induce and secure the purchase by said common council, of said William Goggin, for said city of Chicago, for the place whereon to erect a public school-house," certain real estate, it being the duty of said common council to purchase real estate for said city whereon to erect school-houses, contrary to law, &c. The only question of any importance presented by the record is, whether there is any such offence known to and indictable at common law as an *offer* by any officer to receive a bribe for his influence in his official capacity to induce his favorable action for corrupt and improper purposes.

Bribery at common law is defined to be "the receiving or offering any undue reward by or to any person whatever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity." But in a more extended and enlarged sense it may be committed by any person in an official situation, who shall corruptly use the power and interest of his place for rewards or promises, and by any person who shall give or offer or take a reward for offices of a public nature: 3 Greenlf., sec. 71; 1 Russell on Crimes 154; 4 Bl. Com. 139. In England the offence of taking bribes was punished in inferior officers with fine and imprisonment; and in those who offer a bribe, though not taken, the same: 4 Bl. 140. It is said the law abhors the least tendency to corruption, and upon the principle that an attempt to commit a misdemeanor is itself a misdemeanor, attempts to bribe public officers, though unsuccessful, have been held to be criminal. The object was to preserve purity in official conduct, and in the administration of justice; and the tendency of the bribe being to corrupt official conduct and pervert justice, he who received and he who offered the bribe were alike punished. In no definition of bribery that I have seen does it include a mere offer on the part of an officer to be himself bribed. No reference has been made to any elementary work, or to any

adjudged case that gives such a definition, and I am persuaded that no such authority can be found. Bribery is punished on the ground that it tends to produce official misconduct, or to corrupt the administration of justice. It is difficult to comprehend how a mere offer on the part of an officer to receive a bribe could come within the reason of the rule. A party who would express a willingness to receive a bribe for his official influence is necessarily corrupt, but no extrinsic motive is brought to bear on him by a mere offer on his part, not accepted, other than his own evil inclinations which previously existed, and hence an offer to receive a bribe does not come within any definition of bribery.

There is no such offence defined by our statutes or the common law as an offer on the part of an alderman to receive a bribe as alleged, and the motion to quash the indictment ought to have been allowed, and because it was not sustained I am of opinion that the judgment ought to be reversed. I am unable to comprehend how a party may be indicted for an alleged crime wholly unknown to the law, and on the trial be convicted of immoral conduct, even if it be admitted that such conduct tends to produce official misconduct, and punished as bribery was punished at common law. It would certainly constitute an anomalous proceeding in criminal jurisprudence. Nearly if not all of the misdemeanors defined by common law writers, which it has been thought necessary to punish, have been defined in our criminal code, and provision made for the summary punishment before justices of the peace and by indictment, and in my judgment it is against the policy of our laws to permit indictments for such offences not defined by statute.

Judgment reversed.

The foregoing case is one of such novelty as fairly to justify its republication from the *Chicago Legal News*. The discussion of the question by Judge THORNTON, and the dissenting opinion of Judge SCOTT, have brought out the law, pretty fully. There can be no question, that where the commission of an act is a penal offence, the attempt to commit it, when evidenced by any overt act, will also be an offence: LEE, J., in *Rex* v. *Sutton*, 2 Strange 1074. There must, of course, be some overt act done towards the commission of the offence; mere intention is not sufficient. Hence it was held at first, where no statute existed, that having counterfeit coin in possession, with intent to utter it as good, is not indictable: *Rex* v. *Stewart*, 1 Russ. & Ry. 288. But in a later case, *Rex* v. *Fuller*, Id. 308, it was held, that, procuring counterfeit coin with intent to utter, was an offence, and that having such coin in possession, unaccounted for, and without any circumstance to induce a belief that the prisoner was the maker,

which would constitute a distinct offence, was presumptive evidence of procuring with intent to utter.

But where offences are defined by statute, as in most of the American states, it raises a strong presumption against treating acts as criminal, which are not so defined in the criminal code of the state. And this is more especially so, where such code assumes to define certain offences of the same character, omitting that in question. But notwithstanding all this, if the common law of England has been adopted by such state, either expressly or by long acquiescence, it is not without precedent, to maintain indictments for offences as misdemeanors at common law. But in such cases there should be great watchfulness not to extend so convenient a net, beyond what is clearly defined in the common law precedents. There is nothing more clearly of the essence of despotism, than to hold crimes dependent upon the will of the government, and the construction of the courts. Where there is no landmark or precedent to limit and define such construction, it is scarcely more security to the citizen or subject, than the arbitrary will of the magistrate, and this is not essentially any surer safeguard for the liberty of the subject, than the will of the executive, which is but a euphemism for despotism. We are far from saying that there is anything of this character deducible from the decision in this case. It seems to be, upon the whole, very emphatically in favor both of liberty and good morals. But it comes very much into the debatable ground of constructive offences, and there is great demand for caution, wherever such questions are involved in the administration of criminal justice. It would surely, in the present case, where the legislature have defined the bribing, or attempting to bribe, certain specified officers of the state, as punishable crimes, omitting the office in question, not be an extravagant demand of the courts, in favor of that certainty required in all criminal prosecutions and convictions, that they should hold, that those cases were omitted purposely by the legislature. But we can well conceive, that the disgusting nature of the offence charged, that a public officer should solicit his own purchase; and especially the sensitiveness of the public conscience upon that particular point just at present, might plead very loudly in favor of holding the alleged offender for the commission of a crime, if proved guilty, which from the nature of the evidence seems not very certain to occur. The fact, too, that the moral guilt is much the same here, as in the cases defined in the statute, will guaranty the accused against suffering more than his moral delinquency deserves.

But notwithstanding all these arguments, and many others, in favor of the doctrine of the court in the principal case, we must say, that it bears, in our judgment, more the appearance of the expression of righteous indignation against a vile moral delinquency, than that of a cautious conviction of a clearly-defined crime.

Misdemeanors, at common law, have long been known (1) as offences against public justice, as by hiring or intimidating witnesses to disobey the process of the court: *Buskill* v. *Barrett*, 21 Eng. Com. Law 483; *State* v. *Keyes*, 8 Vt. 57; (2) as offences against the public health, as by selling unwholesome provisions: *Rex* v. *Dixon*, 3 M. & S. 11; s. c. 4 Campb. 12; (3) offences against public decency: 12 Petdff. Ab. 638. This offence of bribery, or attempt at bribery, of public officers, may come partly under both the first and last heads, either as an offence against public justice or public decency, although the latter term has more specific reference to shocking grossness, probably. In short, to use the language of the text writers: "It seems to be an established rule, that

whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law:" 12 Ptdff. Ab. 628; 4 Bl. Com. 65 n.; 1 Haw. P. C., ch. 5, § 4.

No doubt, these terms and many similar ones may be found in the reported cases, sufficiently embracing, in a general way, the offence charged against the respondent. But the rule of law, as we understand it, will not justify convicting one of an offence, which in the opinion of the court comes within these general terms. Such a rule of creating criminal offences in the hands of a corrupt judge, or an unwise and inexperienced one, might be made to cover almost any act of one's life. The rule, of late certainly, has been not to extend the rule of constructive misdemeanors at common law, beyond what the precedents already indicated. It is admitted, there is no precedent for the present case. It is not like *Rex* v. *Vaughan*, 4 Burr. 2494: an attempt to bribe a privy counsellor to give one an office; nor is it like the case of an endeavor to bribe a judge: 2 East 14, 17, 22; or like *Young's Case:* an attempt to influence a juryman in his verdict, cited 2 East 14, 16; or like *Plympton's Case*, 2 Ld. Ray. 1377: an attempt to bribe a mayor in his vote at the election of corporate officers.

It may be said, indeed, that the offence is very similar. And it may be, in regard to its moral turpitude, even more base than any of those defined in the books. But it clearly is not the same, and we may be content to wait till the legislature see fit to make a precedent of it, since the law has confessedly not yet done it. In criminal matters, especially, it is well for the courts to wait upon the legislature, and the existing rules of law, rather than seem to go beyond them, even for the accomplishment of some great good, in time of a perilous crisis in the public sentiment. These things will soon pass away, and other times, and other men, probably, supervene. How much better or wiser, it is not needful to conjecture. We may at least say, sufficient unto the day are the ills we have. We need not, therefore, loosen our present moorings, and fly to those we know not of, as may truly be said of all departures, in the administration of criminal jurisprudence, from established precedent. The evil of admitting constructive offences will become appalling, we fear, when it is too late to retreat. The offence charged in this case seems to demand, for its redress, rather the impeachment and removal from office of the offender, than his punishment without removal, and that is the mode in which the law has hitherto dealt with such offences, and it seems every way the fittest and best.

I. F. R.

Supreme Court of Missouri.

WASHINGTON SAVINGS BANK *v.* EKEY ET AL.

The alteration of a negotiable promissory note after its execution, by filling blanks in a printed form, so as to make the note draw interest at a given rate from date, avoids the note in the hands of an innocent holder for value who has received the same in the usual course of trade, and before maturity.

THE condition of the note, the nature of the alteration, and all the facts necessary to a correct understanding of the point actually decided, appear in the opinion of the court, which was delivered by

ADAMS, J.—The only question presented by this record is, whether the maker of a negotiable note is bound to pay the same in the hands of an innocent holder who took a transfer of the same for value before maturity, where such note, after being executed, was altered so as to bear ten per cent. per annum interest from the date, when it was the agreement of the parties that it should bear no interest? The note was for fifty dollars, and was a printed form, filled up properly in all the blanks except the spaces for the rate of interest and date of interest were left blank, but with the express understanding that the note was to bear no interest. Notwithstanding this was the agreement of the maker and payee, the payee, after the execution and delivery of the note, and without the knowledge or consent of the maker, altered the note by inserting in the spaces left the words "ten" and "*date*," so as to make the note read ten per cent. per annum from date. There was nothing on the face of the note to indicate that it had been altered. That this was a forgery and avoided the note in the hands of the payee, there can be no dispute. The authorities are all agreed that such an alteration of a written contract by a party to it, without the consent of the maker, renders it absolutely void. The only question is, whether this rule applies to commercial paper purchased in the usual course of trade by an innocent holder for value before maturity.

There is much conflict in the authorities on this point, both in England and America, so much so that it is useless to try to reconcile them, and I shall not undertake to review them here. The tendency of the decisions of this court, is that such a forgery avoids the note, not only as between the original parties, but as to innocent holders for value. See *Trigg* v. *Taylor*, 27 Mo. 245; *Haskell* v. *Champion*, 30 Id. 136; *Ivory* v. *Michael*, 33 Id. 398; *Presbury* v. *Michael*, 33 Id. 542; *Briggs* v. *Ewart*, decided January term 1873.

I maintain that this rule is supported by the weight of reason, if not of authority.

Why should the holder be allowed to recover on forged commercial paper? It is urged that to prohibit a recovery in such case would impede its circulation. But there need be no unnecessary delay created by this rule. In all cases the purchaser of such paper must be satisfied that his endorser has the title. He

ought also to satisfy himself that he is honest, or if not honest, that he is a responsible indorser.

The endorser guarantees the genuineness of the paper, and if the paper be forged, he is nevertheless responsible to endorser.

The insertion of the ten per cent. interest from date, was a complete forgery, and, in my opinion, rendered the note void in the hands of the plaintiff.

Judgment affirmed.

The above decision will doubtless be read and scrutinized by business and mercantile men throughout the whole country. There is no subject in which the business community is more deeply interested than it is in preserving and rendering commercial paper a safe and convenient medium for the settlement of balances between all classes of business men. Such paper is transferred by endorsement, or when endorsed in blank, or made payable to bearer, it is transferable by mere delivery. It has heretofore been considered that any course of judicial decision calculated to impede or restrain the free and unembarrassed circulation of such paper was contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence acknowledged by all commercial nations, and it is of vast importance that there should be uniformity of decision throughout the world. We, therefore, propose to briefly examine the above decision upon authority and principle, and will first notice the authorities on which the opinion is professedly based.

In the case of *Trigg* v. *Taylor*, 27 Mo. 245, the payee of the note altered it so as to make a note for $500 read a note for $1500. It was so skilfully done that in the ordinary transactions of business it would not have been noticed. *But there was no question in the case in regard to any blank space being negligently left in the note so as to offer facility for the perpetration of a fraud.* The court, however, had occasion to comment on the rule in such cases, and in doing so, says: "If a blank is left for the amount to be inserted, it may be said with some propriety that the person signing the instrument may be considered as having authorized it to be filled up with any amount, and that it is proper that he, rather than an innocent holder, should suffer the consequence of any abuse of his confidence; but no such authority can be presumed when the instrument is complete, and the blanks entirely filled. If, however, a bill, note or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be made so as not to excite suspicion, the loss ought to fall on the person in fault, according to the familiar rule, that when one of two persons must suffer by the act of a third, the one who affords the means to the wrongdoer must suffer the loss." The court stated this principle, but as there was no evidence in regard to any blank space being left in the note by the maker, and no instructions asked upon this theory, there was no case for its practical application.

In the case of *Ivory* v. *Michael*, 33 Mo. 398, the alterations consisted of filling a blank with the words "thirty days" to make the note read thirty days after date I promise to pay," &c., and by adding to the end of the note the words "bearing ten per cent. after maturity." The court held, that the first alteration, which was made by filling a blank, would not avoid the note in the hands of an innocent third party, and that the second alteration was not made by filling any

blank, but by adding to a note already complete, words which materially changed the instrument. The court remarks, "It is true, as a principle of law, that he who signs a note or bill with blanks in it, and delivers it to another, authorizes such other to fill the blanks; but that principle cannot be invoked in this case, except so far as to warrant the insertion of the words "thirty days." The insertion of the words "bearing ten per cent. interest after maturity" was not the filling of a blank, as the note was a perfect instrument without it; but it was the adding of words to the end of the note, materially changing the terms of the contract by enlarging the liability of the endorser." This same principle was affirmed in the case of *Presbury* v. *Michael*, 33 Mo. 542. There was no question in regard to filling a blank in a note in the case of *Haskell* v. *Champion*, 30 Mo. 136, and the case of *Briggs* v. *Ewart* (not yet reported) was a case where the signature of the maker was fraudulently obtained to a piece of paper which he did not know was a note. we cannot see in any of these cases sufficient ground for the statement in the case under consideration, that "the tendency of the decisions of this court is, that such a forgery avoids the note, not only as between the original parties, but as to innocent holders for value."

This is the course of decision in Missonri. How is it elsewhere? The case of *Young* v. *Grote*, 4 Bing. 253, was where a customer of a banker delivered to his wife printed checks, signed by himself, with blanks for the sums to be filled up by her. She caused them to be filled up with the words fifty pounds, the fifty being commenced with a small letter in the middle of a line, and in this condition she delivered the check, which was afterwards altered by inserting in the beginning of the line in which the word fifty was written, the words three hundred. The banker paid the check for three hundred and fifty pounds, and it was held, the loss must fall on the customer. This case was referred to approvingly in the case of *Taylor* v. *Trigg*, *supra*, and in that of *Worrall* v. *Gheen*, 39 Penna. St. 388, and in *Garrard* v. *Haddan*, 67 Penna. St. 82. where a note was signed by the maker, leaving a blank between the word "hundred" and the word "dollars" which was filled up by adding "and fifty" in such manner that the alteration was not readily noticeable, it was expressly held, that the maker was liable to a holder for the full amount, on the equitable ground that he must suffer who by his negligence occasioned the loss.

In the case of *Goodman* v. *Simonds*, 20 How. U. S. 343, the Supreme Court of the United States says: "It may be asserted, as a general principle, that where a party to a negotiable bill of exchange or promissory note intrusts it to the custody of another, when it is without date, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such bill carries with it on its face an implied authority to fill up the blank; and, as between such party to the bill or note and innocent third parties, the person to whom it was so intrusted, must be deemed the agent of the party who so committed such bill or note to his custody, and as acting under his authority, and with his approbation." The same general principle is stated in numerous cases: *Mitchell* v. *Culver*, 7 Cow. 376 and note; *Androscoggin Bank* v. *Kimball*, 10 Cush. 373; *Violet* v. *Patton*, 5 Cranch 142; *Russell* v. *Langstaffe*, 2 Doug. 514; *Collis* v. *Emmett*, 1 H. Black. 313; *Bank of Pittsburgh* v. *Neal et al.*, 22 How. U. S. 96; *Smith* v. *Wycoff*, 3 Sandf. Chanc. 77; *Waterman* v. *Vose et al.*, 43 Maine 504.

It was held in *Visher* v. *Webster*, 8 Cal. 109, that where a note is given

with the rate of interest in blank, and the holder inserts therein a sum for interest without the knowledge or consent of the maker, it does not become thereby void.

Parsons (2 Par. N. & B. 566) states the principle as follows:—"If the note have blanks left in it, filling them is no alteration. But filling them contrary to agreement or authority of the party who left them is an alteration, which can give the one who filled the blanks no rights against him who left them, though it may bind him who left them to other holders for value."

The case of *Putnam* v. *Sullivan*, 4 Mass. 45, was where A. left his name in blank with a clerk, to be delivered to B. who was to write his note on the other side, payable to A., and with it take up another note on which A. was likewise endorser. B. wrongfully obtained the blank signature from the clerk, and wrote his name on the reverse, but instead of taking up the former note, as intended, put it into general circulation. The court held, that A. could not resist payment of the note in the hands of a *bonâ fide* endorsee for value. This case was referred to and approved in *Wade* v. *Withington*, 1 Allen 561.

The facts stated in the opinion under consideration, show that there was nothing on the face of the note to show it had been altered; there was nothing to evidence the agreement that the note was nót to draw interest. On the other hand the maker of the note used a printed form which to complete would require the filling of the blanks so as to make the note draw interest from date. It does not appear whether the note was transferred by endorsement or by mere delivery. The court attaches much weight to the consideration that the endorsee can look to his endorser, but this argument would have no application to a case where the note was made payable to bearer, and transferred by delivery. We suppose the court rendering this decision, would say that, in such a case, the party receiving the same could investigate in regard to its genuineness or require security, and if this did not prove satisfactory, he could refuse to receive the note. Of course he could, but what effect would this requirement have on commercial paper as a convenient way of adjusting balances between parties so situated as to render such investigation inexpedient? Instead of being a safe medium of payment and adjustment, it would be a fruitful source of fraud. The value of everything is represented by money, and money is represented by bills of exchange and negotiable promissory notes. Possession of money is all the evidence of title which parties dealing in good faith need look to, and to make commercial paper an adequate representative of money, and make it subserve the purpose for which it was brought into general use, it must circulate, as nearly as practicable, with the same freedom and safety to those who receive it in good faith in the ordinary course of business, and the man who places such a piece of paper in circulation, in a condition to enable a party with whom he deals to easily perpetrate a fraud on the business community, ought to suffer rather than an innocent party. And would it not be better that such a person should suffer the consequences of his negligence, than to establish a rule which will materially embarrass and endanger the free and safe circulation of commercial paper?

H. B. Johnson.

Supreme Court of the United States.

THOMAS D. MARSHALL *v.* HENRY KNOX ET AL.

An assignee in bankruptcy cannot interfere with the possession of goods by the officer of a state court under an execution, or with the possession of any person claiming either the absolute property or the right of possession to enforce a lien

Nor can such officer or person be brought within the jurisdiction of the Court of Bankruptcy by summary process under rule to show cause. His rights can only be adjudicated in a plenary suit at law or in equity for that purpose

The attachments on *mesne process* which are dissolved by an adjudication of bankruptcy are those which only become perfected liens by the judgment which may ensue in them.

A writ of *provisional seizure* for rent, in Louisiana, is in the nature of an execution, and gives a lien on goods which is not discharged by a subsequent adjudication of bankruptcy of the tenant.

The sheriff under a writ of provisional seizure took a tenant's goods into possession for rent. Tenant then filed a petition and was adjudged a bankrupt. His assignee took a rule on the sheriff and the lessor to deliver possession of the goods, and the Bankruptcy Court made the rule absolute, and refused to allow an appeal. The lessor then filed a bill in the Circuit Court, and after sale of the goods by the assignee, a supplemental bill, praying a review of the proceedings, an account and damages. *Held*, That the Bankruptcy Court had no jurisdiction to make the rule; that this was an original bill of which the Circuit Court had jurisdiction, and that an appeal properly lay from the decree of the Circuit Court to this court.

The measure of damages is the full value of the goods and all the taxable costs of the litigation, the whole however not to exceed the amount of rent due.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Marshall, the appellant, being the owner of a plantation in Avoyelles, Louisiana, leased it to Nathan G. Smith and Henry Fuller for three years, from January 1st 1867. At the end of the first year the tenants were in arrear $1400, and on January 4th 1868, Marshall commenced an action therefor in the District Court of the parish, and obtained a writ of provisional seizure (as it is called), being the usual process by which a lessor takes possession of his lessee's property found on the premises, for the purpose of enforcing his lien thereon. This writ was served by the sheriff on January 6th 1868, by serving a copy on the lessees, and by a seizure of their property on the land, consisting of mules, wagons, farming implements, and stock, grain, furniture, &c., appraised at $1744.

On January 15th 1868, Smith, one of the lessees, filed in the District Court of the United States for Louisiana a petition to be declared a bankrupt, and was declared such accordingly; and on the 12th of February 1868, the defendants were appointed his

assignees. Defendants obtained from the court a rule upon the lessor (the complainant) and the sheriff to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed to have a privilege on the property, and that it was necessary for a proper adjustment of all claims, privileges, and liens, that the possession should be surrendered to the assignees, to be subject to the bankrupt court. The lessor contested this rule, stated his own rights and proceedings, and claimed possession of the property through the sheriff, for the purpose of selling the same to raise the amount of his rent. The rule, however, was made absolute, without, so far as appeared, any other proof on the subject. The lessor appealed, but the district judge would not allow the appeal, and there was no justice of this court at that time (April 1868), assigned to that circuit to whom application could be made. The lessor thereupon filed the present bill for an injunction to prohibit the assignees from proceeding under the said order of the bankrupt court, and from taking possession of said property, and for a decree that they be directed to pursue any residuary interest of the bankrupt in the lessor's suit in the District Court of the parish, and not molest him in detaining and subjecting the property to the payment of his rent, and for further relief. Failing to obtain a preliminary injunction, and the property being taken and sold by the assignees, the lessor filed a supplemental bill, complaining of the illegality of the proceedings, asking for a review of the same, and for an account and damages. The bill and supplemental bill set out the lease, the provisional seizure, the proceedings in the bankrupt court, and the acts of the assignees; and complained that the lessor was injured by a sacrifice of the property; and stated that before filing the original bill he had offered the assignees a bond, with sufficient sureties, to protect any persons claiming any superior liens to his on the property, if any such there were, which, however, he denied.

The defendants, in their answer, alleged that the lessees had a counter claim for repairs and permanent improvements, and that a number of hands employed on the plantation had a privilege for their wages superior to that of the lessor; but no proof of these facts was offered in the case.

The principal allegations of the complainant were proved, and the defendants on their part adduced proof to show that they had

acted in good faith under the orders of the bankrupt court, and that they had sold the property fairly, and held the proceeds for distribution, according to the rights of the parties in due course of the bankruptcy proceedings.

On hearing, the bill was dismissed for want of jurisdiction, whereupon complainant took this appeal.

The opinion of the court was delivered by

BRADLEY, J.—(After stating the facts.)

The first question is, whether this decree was rightly made, and it is to be solved by reference to the second section of the bankrupt act. By this section it is declared that the Circuit Courts "shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity." By a subsequent clause of the same section it is declared that said courts "shall have concurrent jurisdiction with the District Courts * * * of all suits at law or in equity * * by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee."

The first clause confers upon the Circuit Courts that supervisory jurisdiction which may be exercised in a summary manner, in term or vacation, in court or at chambers, and upon the exercise of which this court has decided that it has no appellate jurisdiction: *Morgan* v. *Thornhill*, 11 Wall. 65.

The second clause confers jurisdiction by regular suit, either at law or in equity, in the cases specified; that is, in controversies between the assignee and persons claiming an adverse interest, touching any property of the bankrupt.

The present case is in form a regular bill in equity; but it also asks a revision of the action of the District Court in the premises. As an original bill in equity it cannot stand, if the District Court had jurisdiction to proceed as it did; for the matter was already decided in that court. As a bill to review the proceedings and decision of the District Court, it was a very proper proceeding, and ought to have been entertained by the Circuit Court. The revisory jurisdiction of the Circuit Court may be exercised by bill as well

as by petition; and as this bill complains of the action of the District Court, and asks for a review and reversal thereof, the Circuit Court erred in dismissing it for want of jurisdiction. But regarded as a bill of review, we could not, according to our decision in *Morgan* v. *Thornhill*, entertain an appeal from the decision of the circuit court in the case.

The appeal, therefore, must be dismissed, unless it can be shown that the District Court proceeded without jurisdiction. If this were the case, then the bill may be regarded as an original bill, of which the Circuit Court clearly had jurisdiction, and the appeal to this court was properly taken.

The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor. Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court; and the court had no control or jurisdiction over them.

Under these circumstances the assignees applied for and obtained from the District Court, a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law?

The bankrupt law does not distinguish in what cases the District Court may proceed summarily, and in what cases by plenary suit: and we are left to decide the question on the general principles that affect the case. The second section, however, in conferring jurisdiction on the Circuit Courts, uses this language: "Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of *all suits at law or in equity*, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt." This language seems to indicate that where

there is a claim to an adverse interest in the property, a suit at law or in equity will be the mode of redress properly resorted to. The eighth section, in granting appeals and writs of error from the district to the circuit court, only does so in cases in equity and at law, and in cases where the claim of a creditor is allowed or rejected. If, therefore, adverse claims to property could be decided by the summary action of the District Court, not only would the party claiming adversely to the assignee be deprived of a trial by due process of law, but he would be without appeal. An appeal was in fact denied in this case.

We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defence of their rights.

The subject, in one of its aspects, came before this court in the case of *Smith* v. *Mason*, 14 Wall. 419. In that case the adverse claim was to the absolute property of the fund in dispute; not, as in this, to a mere lien, and to possession by way of pledge under the lien; and we held that the bankrupt court could not, by a mere rule, make the adverse claimant a party to the bankruptcy proceedings and adjudge his right in a summary way, but that the assignee must litigate the claim in a plenary suit, either at law or in equity. But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the "ascertainment and liquidation of the liens and other specific claims" on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. It is the opinion of the court, therefore, that the case is not substantially different from that of *Smith* v. *Mason*. Besides, it has another point, in common with that case, upon which a direct adjudication was made therein. The lessor in this case was not a party to the bankrupt proceeding; and in *Smith* v. *Mason* we held expressly that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such

litigation, cannot be compelled to come into court under a petition for a rule to show cause."

The court is of opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees. It results that the bill in this case was properly filed as an original bill, and on that account should not have been dismissed for want of jurisdiction. The case should have been heard and decided upon the merits.

We are then brought to the question of merits. If the complainant had no right to hold the goods, notwithstanding his claim to hold them, in an action at law against the assignee he could have recovered only nominal damages; and, coming into a court of equity for redress, and praying for an account of the value of the goods, and for damages, if it turn out that he had no right to withhold the goods from the possession of the assignee, the court would be very reluctant to compel the latter to place the value of the goods in his hands to be relitigated in another suit. A court of equity having got possession of the case by the lessor's own act, must proceed to decide the whole merits of the controversy.

But we think it very clear that the complainant had a right to the possession which he claimed. The fourteenth section of the bankrupt act, it is true, vests in the assignees all the property and estate of the bankrupt, "although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of such proceedings." But this clause evidently refers to those cases of original process of attachment, which only become perfected liens by the judgment which may ensue. The lessor's lien for rent on the goods of his tenant situate on the premises is one of the strongest and most favored in the law of Louisiana. The articles of the civil code use the following language:

"The lessor has for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased." Art. 2675.

"In the exercise of this right the lessor may seize the objects which are the subject of it before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified." Art. 2679.

"The right which the lessor has over the products of the estate,

and on the movables which are found on the place leased for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid." Art. 3185.

When the rent accrues, or even before it is due, if the lessor apprehends that the goods may be removed, he may have a writ of provisional seizure to the sheriff, who, by virtue thereof, takes possession of the goods and sells them in due course, as soon as the court has recognised the amount of rent for which they are liable.

Such a case is similar to that of an execution, in reference to which it has been properly held that where the levy is made before the commencement of proceedings in bankruptcy, the possession of the officer cannot be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. Such, we think, were the relative rights of the parties in this case. If the assignee apprehended that the sheriff would, by delay or negligence, waste the goods in his hands, he could either apply to the District Court of the parish for redress or aid in the premises, or perhaps file a bill in equity in the Circuit or District Court of the United States.

The next question is, what relief ought to be given to the complainant?

The goods have been sold by the assignees. They cannot be returned in specie. The supplemental bill prays that the assignees be decreed to account to the complainant for the full value of the property, and also such sum of money as he might be entitled to receive by reason of the wrongful acts of the assignees in the premises, and for further relief. The bill, it must be remembered, was originally filed for an injunction to prevent the assignees from disturbing the complainant in his possession of the goods. He was not in laches in defending his rights. He is clearly entitled, under the circumstances of the case, to the full value of these goods, clear of all expenses, whether the assignees realized that value or not (limited, of course, by the amount of rent which he is entitled to be paid); and also to all the taxable costs to which

he has been put by this litigation. As to any damages beyond that, if he has suffered any, we think that he ought not to recover them in this suit, as he, or the sheriff for his benefit, had an option to bring an action of trespass for damages, instead of resorting to a court of equity for relief. Damages are allowed, it is true, in certain cases, as incidental to other relief; but even if they could, in strictness, be awarded in this suit, we do not think that the case is such as to call for the interposition of the court in directing an inquiry as to damages.

The decree must be reversed, with directions to the court below to proceed in the cause in conformity with this opinion.

Supreme Court of Tennessee.

J. M. HUDSON ET AL. *v.* S. Y. BINGHAM ET AL.

A discharge under the Bankrupt Act of 1867, by a Bankruptcy Court having jurisdiction, when properly pleaded in bar to a suit in a state court, whether of law or equity, is conclusive, and cannot be attacked for fraud in obtaining it.

A material fact in a suit either at law or in equity cannot be put in issue by a notice that it will be contested at the trial; it must be regularly pleaded.

THIS was a bill in equity, filed by complainants, as creditors of S. Y. Bingham, seeking to set aside two deeds conveying tracts of land to defendant, Harris, on the ground that they were made to hinder and delay the creditors of Bingham, and were therefore fraudulent and void. The defendants answered, denying all fraud, and insisting on the *bona fides* of these conveyances. In addition to this denial, Bingham, in his answer, set up as a defence to a recovery on the debts sought to be enforced, his discharge in bankruptcy, granted by the District Court of the United States for West Tennessee.

This answer was filed June 8th 1871, and on December 12th 1871, complainants caused a notice to be served on said Bingham, and filed in the cause, that on the hearing in the Chancery Court at Huntingdon, the complainants would insist that the discharge in bankruptcy was invalid, by reason of a fraudulent withholding of a true statement of the property and assets of said Bingham, from the schedule required to be filed by him with his petition for bankruptcy, and other acts specified in the Act of Congress, which might have been urged as a reason for withholding said discharge in the District Court, or for annulling said discharge within two years after its date, on proper proceedings, as required by the Bankrupt Law of 1867.

The opinion of the court was delivered by

FREEMAN, J.—Before proceeding to discuss the main question debated so earnestly before us, it is proper to say that we know of no rule

of law, or of practice or pleading in our state by which a material fact involved in the decision of a case in the Chancery Court, can be put in issue upon a notice given to a party, that such fact will be contested on the hearing of the cause. The defendant had presented his defence to the decree sought against him, in his answer, and had tendered therewith the evidence of such defence, complete in form, and *primâ facie* conclusive in his favor in any aspect of the question—in the form of the record of a decree made by a court of competent and even of exclusive jurisdiction to adjudge the matters purporting to have been adjudged by that decree. We need but say that the notice referred to can be of no importance in this case, as it is not a pleading, and on its allegation no issue has been or could be made.

The case, then, presents the simple question as to whether, when a defendant presents by way of defence to a demand sought to be enforced against him, in a state court, the plea of a formal discharge in bankruptcy, the complainant in a case in the Chancery Court can defeat the conclusive effect of the adjudication in the bankrupt proceedings, by showing by proof that there was a violation of the requirements of the Bankrupt Act of 1867, in withholding a full statement of his property in his schedule required to be furnished by the act with his petition, or for any of the causes set down in said act. It will be seen, by this statement of the question, that we must look to the proof, and not to any allegations of any pleadings, to see what the ground of attack on the validity of this judgment is—not a very satisfactory mode of investigating the question, to say the least of it.

Waiving these matters, however, we proceed to examine the question pressed on our attention by counsel. We may say that a majority of the court have in at least two cases, one at Knoxville and the other at Nashville, within the last twelve months, adjudged the question presented, and laid down the rule that the discharge of a bankrupt could not be attacked collaterally in a state court for the cause referred to; but inasmuch as the case is earnestly pressed on us, we review the question, premising that after two adjudications of the question in which it was seriously investigated, we ought not only to be convinced that our former views were erroneous, but that they were clearly so injurious to the rights of parties and detrimental to sound policy, that the rule should be changed, before we can consent to overrule our own decisions. In order to a proper understanding of the question involved, it is proper to ascertain with some distinctness what is the nature and character of the proceedings in bankruptcy, and what are the matters involved in such a suit, and what the character of the jurisdiction exercised in such proceeding by the District Court of the United States. It is obvious that the proceeding is one of peculiar character, having in it elements not found in the ordinary proceedings of our courts, either state or federal. The character of this proceeding may be perhaps better seen by considering the general purpose of the law in connection with the precise provisions of the Act of Congress for the carrying out of that purpose. As said by Mr. Bump, p. 172, the best author we have on this subject at present, "The great object of all bankrupt or insolvent laws is to distribute the property of a debtor, who is unable to pay his debts in full, among his creditors (and we may add among *all* his creditors), by judicial proceedings in which all may be heard, and to discharge

his property afterwards, or at least his person, from the debts owed by him at the time of the institution of such proceedings." The Bankrupt Law of 1867 evidently contemplates this, and we may sum up its purpose as shown by its various provisions, to be what the certificate of discharge on its face purports it to be, as prescribed by the 23d section of the act, a decree or judgment of the court that the party "be for ever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the day the petition for adjudication was filed." In other words, taking the Bankrupt Law of 1867 in its full scope, the proceeding under it is a suit by the party petitioning (where it is a case of voluntary bankruptcy), against all his creditors, with certain exceptions named in the act, in which the petitioner seeks, by the judgment of the District Court of the United States, to be for ever discharged from all his debts, which are provable against his estate by the provisions of the law of Congress, and which exist at the time of filing his petition. This is the plain and well-defined object of the proceeding, and all the regulations prescribed in the statute for the conduct of the suit thus commenced are intended to effectuate this end, and at the same time give such creditors who are to be defendants to this suit ample means of proving their claims, and sharing in the final disposition of the estate of the bankrupt *pro rata*, according to the amount of their debts. In order to carry out the purpose of the law, it is provided that the petitioner shall annex to his petition a schedule or oath, containing a full and true statement of *all his debts, and as far as possible* to whom due, with the place of residence of each creditor, if known to the debtor, and the sum due from him—in a word, a full list of the parties against whom the suit is brought, as far as practicable: Sect. 11, Act of 1867.

It will be seen, however, from this and other provisions, that absolute accuracy in this matter is not required, for it is to be done as far as practicable. Notice of the filing of this application or petition is to be published in such newspaper as may be designated, and the marshal is under an order provided for "to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the petition, or whose name may be given to him in addition by the debtor, which notice shall specify, among other things, the issuing of the warrant in bankruptcy against the estate of the bankrupt, and that a meeting of the creditors, giving name and residence and amounts, so far as known, to prove their debts, and choose an assignee of the estate, will be held at a time fixed in the notice. These provisions show the character of the proceeding to be such as we have indicated, and that all the creditors, so far as known, are to be made parties by actual notice, and, as we think, the publication in the newspaper was clearly intended to apply to those not known, or whose residence was not known. This being the character of the proceeding, the judgment of discharge by its terms is an adjudication of the question involved in the suit, and is between the petitioner and all the defendants, his creditors, a decree binding and conclusive on all who are made parties in accordance with the provisions of the act; or, in the language of the decree of discharge, is an adjudication that "he is discharged from all debts and claims which by said act are made provable against his estate, which existed at the commencement of the suit." In this view of the

question, upon a principle of universal recognition, the judgment of a court of competent jurisdiction is conclusive of all matters adjudged as between parties to that suit, and cannot be collaterally attacked or questioned before any other tribunal. We need cite no authority for this proposition. It is axiomatic. This being so, it follows that, unless the complainants can show that they are excepted from the operation of this rule by some well-settled principle of law, the decree of bankruptcy is and must be conclusive as to them as to their debt, it being in existence at the commencement of the bankrupt suit, and a debt provable under said proceedings. This view would seem conclusive of the question on principle, but the case is still stronger. Under the Bankrupt Law of 1841,—which, in its general features, was precisely the same as that of 1867—it was held by the Supreme Court of the United States, in the case of *Shawhan* v. *Wherritt*, 7 How. 331: "The public notice required by the act to be given having been made, the creditors must be treated as having notice of the proceedings, and an opportunity to make objections to them, and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are in the nature of proceedings *in rem*, before a court of record having jurisdiction. This being so, it is well settled that in a proceeding *in rem*, or in its nature, the decree is conclusive against all parties having the right under the proceeding to control the decree. This is a universal principle, with no exception, so far as we have been able to see. If this be the correct view of the question—and being by the Supreme Court of the United States it is conclusive on us—then the question before us does not admit of doubt, and the decree in bankruptcy is conclusive as against a collateral attack on it. We are aware that several state courts, among them our own, held, under the Act of 1841, in construing the clause as to the effect of the discharge, making it subject to attack in our courts, that it might be avoided by showing fraudulent concealment of property. We doubt very much the correctness of that view under that act. It suffices to say, that it was never so held by the Supreme Court of the United States; and the principle laid down in the above case would indicate that no such doctrine would have been maintained by that court had the question been brought before it. However, the language of the clause as to the effect of the discharge, in the Act of 1841 and 1867, is entirely different, and does not admit of the same construction, as we shall show in an afterpart of this opinion.

In addition to the above, however, the conclusive effect, on general principles, of such a decree is strengthened by the fact of the jurisdiction exercised by the Federal court, and the exclusive control which the Federal government has over this peculiar question of bankruptcy. Sect. 8 of article 1 of Constitution of United States, in defining the legislative power of the Federal government is, among other things, "The Congress shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States." Since the great leading case of *Sturgis* v. *Crowningshield*, 4 Wh. 122, decided in 1819, and the opinion of MARSHALL, Chief Justice, in that case, it has been settled with almost perfect unanimity, that this power is so far exclusive in the Federal government, that when exercised by the passage of a law regulating bankruptcies, it is inconsistent and incompatible with

the exercise of a similar power by the states. In pursuance of this view, it is settled beyond dispute, by an overruling weight of adjudication, both state and Federal, that the moment a bankrupt law of the United States goes into operation, all state insolvent laws, become inoperative and are suspended: See case of *Reynolds*, 8 R. I. 485, where the cases on this question are cited. This being so, it is clear that the jurisdiction of the District Courts of the United States over the whole question of bankruptcy, is exclusive, as being the exercise of a power granted to the Federal government alone, and the administration of a remedy given or suit brought in pursuance of, and under a statute of the United States, which no state court can be called on to administer, and over which it has no control. The power conferred by the Constitution on Congress on the subject of bankruptcy, has been exercised by that body in the passage of the Act of 1867, and the machinery for carrying out its purpose has been confided exclusively by Congress to the courts of its own government, as was proper should be done. In this view of the case, to hold that the decree of courts having this exclusive jurisdiction could be set aside by a collateral attack on them, and proof of matters, which if shown in the suit in those courts would have prevented the decree from being rendered, would be so far in violation of all principle, that we opine no judicial mind would entertain it as a serious proposition for a single moment. To the state court this decree of the Federal courts stands as the decree of a tribunal having complete and exclusive jurisdiction over the whole question to settle and adjudge all matters involved in the proceeding, and unless void on its face it can never be attacked or disregarded. In such cases the regularity of the proceedings is presumed, jurisdiction confers the power to render the judgment, and no irregularity in the forms of proceeding will affect its validity, and it is binding until set aside in the court in which it was rendered: *Dolson* v. *Pierce*, 12 New York 156; *Kinnier* v. *Kinnier*, 45 Id. 535, and cases cited. This being so, and in connection with the other principles we have laid down, it is beyond question, that the decree of the District Court is conclusive on general principles, unless the power is given to a state court by the act itself to declare it inconclusive and void, or unless by the law of Congress, it is not made conclusive in its effect, as in case of other decrees and judgments of courts of general jurisdiction.

We proceed now to examine the law of Congress itself, to see what is the effect of this discharge in bankruptcy by its provisions? It must be remembered that the law of Congress is directed to the action of the Federal courts, contemplates proceedings in them, and prescribes the mode of their action exclusively. That Congress by virtue of its exclusive control over the whole question, has the power to declare the effect of the discharge which shall be granted by the decree of its courts, is not questioned by any one. We turn to the language of the law to see what that effect is, as declared by the Federal legislature which enacted the law: By sect. 34 of the act of 1867, it is provided: "that a discharge duly granted under this act, shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment, that on the day of its date, such discharge was granted to him, setting the same forth in *hæc verba*

as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the *fact* and the regularity of such discharge," that is, that the decree has been rendered, and the proceedings were regularly conducted. This portion of the section admits of but one construction, and makes the discharge in accordance with general provisions of law, conclusive as in other judgments and decrees of courts of competent jurisdiction. It applies to the effect of this discharge in any and all courts, where the party may be *sued* or impleaded to recover and enforce such debts, for it provides how it shall be *pleaded* in defence to such suits, and its effect in such cases, where the claims are sought to be enforced by such a suit. This feature of this clause we think has been overlooked generally in the discussion we have seen as to the effect of the discharge; that is, the fact that this clause applies specifically to the effect that shall be given to the discharge by any and all courts in which suits should be brought to enforce any debts which were or might have been proved against the estate of the bankrupt in the bankruptcy suit. It makes the discharge conclusive as a plea in all such cases, if language can do so, and to this effect in such suits there is no exceptionable provision in the statute. Then follows a proviso, however, for the benefit of such creditors, in this language: "*Always provided*, that any creditor or creditors of said bankrupt, &c., who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same." It then goes on to regulate the mode of procedure in such cases, and what judgment shall be rendered by the court. It further provides, that if the fraudulent acts alleged are not proved, or if the court shall find that they were known to the creditor before the discharge granted, the judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected. Here is a mode of attacking the validity of a discharge and having it annulled, provided by the act itself, by which the previous conclusive effect of the discharge, given by the first part of the section, is or may be avoided. It is not provided, however, as we are called on to decide here, that notwithstanding this conclusive effect, provided for, it nevertheless may be shown to have been fraudulently obtained in all cases when interposed by plea in accordance with the statute, nor that this may be shown by proof to avoid the conclusive effect of such discharge. That this was not intended to be done is strengthened by the fact that the Congress of the United States had passed several similar laws before this, which had been administered and construed by the courts of the country. The last, passed in 1841, had a provision that was in precise accord with the views maintained by counsel in this case. It was as follows: "Such discharge, when duly granted, shall in all courts of justice, be deemed a full and complete discharge of all debts, &c., which are provable under this act, and shall and may be pleaded as full and complete bar to all suits brought in any court or judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, *unless* the same shall be impeached for some fraud or wilful concealment by him of his property, &c., contrary to the provisions of this act." The proviso here is for impeaching it in all courts,

or was so construed, but in Act of 1867 is for annulling it only by the proceeding there given. This provision is entirely different in its terms and purpose from the Act of 1867, and unless we hold that the latter act by the use of different language, definitely and clearly expressing a contrary purpose, intended to provide for the same thing as the Act of 1841, we must conclude no such effect was intended, as contended for in this case. The debates in Congress show, we believe, that the purpose was as we have construed it, and to establish a different rule from that of the Act of 1841.

Several other sections of the Bankrupt Law are referred to, however, as sustaining the views contended for, some of which we notice. 1st. The 21st section is urged, which in the first clause, only provides that no creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action, &c. Without critically examining this clause, we need but say, that, taken in connection with the balance of the section, it has no application whatever to the effect of a discharge, but only to the right to prosecute or bring suits against the bankrupt during the pendency of the bankrupt proceedings, as is shown by subsequent parts of the section providing for such suits being continued by leave of the Bankrupt Court to the point of a judgment, and then the debt proven against the bankrupt's estate. The construction contended for by the counsel would involve the absurd conclusion, that the whole effect of the bankrupt proceedings might be avoided at the option of any and every creditor, by a simple refusal to prove his debt. If this was the true construction of the law, then it would render its provisions entirely nugatory, for no creditor under such circumstances would ever come in, but only wait and take his chances by diligence to secure his own debt in his own way, and not to share in distribution of assets of his creditor *pro ratâ* with all his other creditors. Such would be the result of the proposition of counsel in this case which is, "that a creditor who has not proven his debt may bring his suit in any court of law or equity, notwithstanding the discharge granted, the section applies only to the bringing or prosecuting suits pending the proceedings, any one may bring suits after the discharge, and the law does not interfere to prevent it, and he may have a judgment, if the bankrupt chooses to waive the benefit of his discharge, and not interpose it for his protection. But if he pleads it, then the law says it shall be a complete bar to all suits brought on such debts as "were proven or might have been proven against the bankrupt's estate." We may dispose of these arguments by reference to the general provisions of sect. 29, which furnish the strongest support to the views maintained. This section is the one which provides for granting the discharge, fixes the time when it shall be granted, the notice to be given to creditors, and the terms on which the court shall grant it. It provides alone for the action of the District Court in proceeding in bankruptcy, and has no reference to suits brought after the discharge, or suits to enforce claims, which were proven or might have been proven against the estate—as sect. 34 does. It says to the Bankrupt Court, no discharge shall be granted, or if granted valid, in certain cases, or on certain facts being shown to said court, and in conclusion of the section, requires the bankrupt to take an oath, that he has not done or been

privy to any act, matter or thing specified in this act as a ground for withholding the discharge, or as invalidating it, if granted. The next section 30, provides that no person shall be granted a discharge, who had previously been discharged under this act, except under certain conditions.

The 31st section then provides for any creditor opposing the discharge, filing his specifications in writing of the grounds of his opposition, and for the court ordering any question of fact so presented to be tried at any session of the court. The 32d section then enacts that if it shall appear to the court that the bankrupt has in all things conformed to his duty under the act, and that he is entitled to receive his discharge from all his debts, with the exceptions specified, the court shall grant him the certificate which is provided for, and which we have quoted. It is obvious from this summary of the sections and their provisions, that they are all intended to be brought into operation, and bear on the question of granting the discharge by the court, and provide for proceedings to be had before the same is granted. Then follows after the form of the discharge, the provision section 33, exempting certain debts from the effect of the discharge so granted; and then the section which we have before quoted and commented on, as to the conclusive effect of the discharge in cases where suits are brought on debts proven or provable, and the *proviso*, giving the only means of defeating or avoiding this conclusive bar, thus provided by the state, against such suits. This proviso contains the only provision of the law of Congress by which this conclusive effect is to be prevented on such debts, and that is by having the decree granting it annulled and set aside on proceedings regularly instituted for the purpose, within two years from the time of granting it. It will be further seen from the language of the section immediately preceding the discharge, that the court is required to then adjudicate the question, as to whether the bankrupt has in all things conformed to his duty under this act, and in view of this investigation is entitled to his discharge. In addition the discharge itself recites the fact on its face, that the party has been duly adjudged a bankrupt, and *appears to have* conformed to all the requirements of law in that behalf, and *therefore* it is ordered by the court that he be for ever discharged from all debts, &c. So that it appears clearly that the act contemplates all these facts to have been investigated and adjudged by the discharge. This would have been conclusive on all creditors having proven, or who had provable debts, on general principles; therefore the subsequent section removes this difficulty by defining the effect of this discharge, and providing how it may be defeated by proceeding instituted for the purpose within two years This, it seems to us, is the plain, obvious construction of the statute, when closely examined, and harmonizes it with the nature of the proceeding, and general object and purpose of all such laws, and especially with the whole purview of the whole Act of 1867.

Such has been the almost uniform holding of all the courts before which this question has come. They have uniformly, with but one exception only which we have seen, in Connecticut, held that the authority to declare a discharge void in a state court, is incompatible with the jurisdiction conferred on the Federal District Courts on this subject, and we think on the soundest reasons. See *Corey* v. *Rip-*

ley, 57 Maine 69; *Oates's Adm'r* v. *Parish*, 47 Ala. 157. Mr. Bump, in his work on Bankruptcy, p. 243, says this is the sounder view of the question. He says: "the power conferred on the Court of Bankruptcy to annul a discharge is exclusive, and the discharge, like any other judgment, cannot be impeached, when brought in question in a collateral action by any party who has been properly notified of the pendency of the proceedings in bankruptcy. The statute, it is true, declares in section 29 that the discharge, if granted, shall not be valid if the bankrupt has committed any of the acts which would constitute valid grounds for withholding it; but this evidently contemplates the means subsequently provided for annulling it." If this were not so, he adds, "it would be idle to summon creditors into a special court to set up objections which could be alleged and tried equally as well in any court. There must, moreover, be an end of litigation, a time beyond which contains facts cannot be contested. The necessity of meeting and contesting them in every court in which the discharge may be pleaded is a hardship Congress never intended to impose upon the bankrupt, and is, moreover, so flagrantly unjust and contrary to all the ordinary principles of jurisprudence, that nothing but the imperative demand of the statute could justify or warrant such a construction." This view of the question is certainly one having great force of reason in it. In addition, we add other reasons, which we think strengthen this conclusion. It seems to us that such a power would be inconsistent with the exclusive jurisdiction of the whole subject by the Federal government and render such a discharge and decree of these courts, in many if not in most cases a burden and a snare, rather than a relief to a debtor. He goes into a court of exclusive jurisdiction and prosecutes his suit with effect to a decree discharging him from his debt, but this only proves a delusion in the construction contended for, by exposing him to have the whole question of its validity to be retried at suit of any fretted creditor, who may choose to harass a despised bankrupt, and thus, after a solemn decree of this court, if he has a thousand creditors, each one of them may sue him, and attack the validity of the decree, it may be many years afterwards, when his witnesses are dead, or he dead, his personal representative who knows nothing of the facts, be sued on the ground that some article of property he was supposed to own was not delivered up in his schedule or some one of the requirements of the law not complied with, and this in the face of the decree of the court adjudging that he had conformed to his duty in all the requirements of the law at the time.

Again, he may have had the very grounds urged against his discharge by one creditor then under the provision of the law, and the matter been decided in his favor, or it may have been attempted to annul his discharge within the two years by another, and the court may have decided in that issue again in his favor, yet in this view another creditor, who had not chosen to prove his claim, might still require him to try the same question over again. Further than this, his discharge may have been, under this view of the law, contested and declared void by a state court, within the two years, and yet on proceedings instituted under the statute by other creditors in the district, having full jurisdiction over the whole question, it may have been adjudged valid, and not subject to be annulled for the causes stated. Which judgment is to be held correct, and which shall relieve him from his embarrassment? None can

tell. In a word this view of the law enables the state courts, having no jurisdiction over the original question, to practically nullify, if they choose, the effect of the adjudication of the courts of the United States, having exclusive jurisdiction over the whole subject, and as we have said is incompatible with the powers granted to the Federal Government to grant a discharge in bankruptcy, because it enables the courts of near forty states to nullify and render it inoperative. Truly, no such construction ought to be given to the Act of Congress unless its terms imperatively demanded it, and we think we have shown that they neither demanded it, nor even fairly admitted of it, when fairly considered and construed. This view of the question is in accordance with well settled principles, applied in all other cases of construction of statutes. The whole bankrupt proceeding is one under a statute of the United States. The powers exercised and the remedies provided, in the language of the Supreme Court of Maine in *Corey* v. *Ripley*, are given by the statute. The impeaching tribunal is specified by the statute, and its mode of proceeding pointed out, and this designation, on well settled principles of interpretation, forms a part of the remedy and excludes all others. For which the court cite numerous cases, which might be added to indefinitely, if deemed necessary.

The case of *Dudley* v. *Mayhew*, 3 N. Y. 11, is a case precisely in point, in which the authorities will be found collected, and the reasoning given, and which settles the principles laid down beyond all dispute. We therefore hold that the discharge granted by the District Court, having jurisdiction over the person and estate of the bankrupt, is conclusive as a bar to all suits commenced in state courts, when interposed by plea as provided in the statute, so far as any attack can be or shall be attempted to be made, by alleging fraud in obtaining it, by withholding assets, or other cases specified in the statute, for which the statute has provided the remedy by authorizing the discharge to be annulled by the proceedings therein pointed out. We have twice before had occasion to examine this question, and have again given it a careful review, because of its importance and the urgency of counsel: and we feel no question as to the soundness of the conclusion at which we have arrived. The result is that the Chancellor's decree on this subject is correct and must be affirmed.

The earlier decisions upon the important question discussed in the foregoing opinion were against the conclusiveness of the discharge. In *Beardsley* v. *Hall*, 36 Conn. 270 (1869), it was held, without much discussion of principles or of the details of the Bankrupt Act, that the discharge could be attacked for fraud in its procurement, in any court where it was set up as a defence. To the same effect are *Perkins* v. *Gay*, 3 Bank. Reg. 189 (1870), in the Superior Court of Cincinnati, and *Batchelder* v. *Law*, 43 Vt. 662 (1871), in which case WHEELER, J. delivered a strongly reasoned opinion, taking the ground that where a debt had been fraudulently omitted from the schedule and the creditor thus prevented from getting notice of the bankruptcy proceedings, he was a stranger to them and not estopped from contesting the discharge.

The later and probably better opinion, however, is in favor of the absolute conclusiveness of the discharge in all actions except the direct proceeding to annul it, given by the act: *Corey* v. *Ripley*, 57 Me. 69; *Ocean Nat. Bank* v. *Alcott*, 46 N. Y. 12; *Oates* v. *Parrish*, 47 Ala. 157, and the unreported case of *Parker* v. *Atwood*, in the Supreme Court of New Hampshire, ante, p. 530. J. T. M.

Supreme Court of Vermont.

STATE OF VERMONT v. THOMAS PATTERSON.

It is not necessary in order to make dying declarations admissible in evidence, that the declarant should state everything constituting the *res gestæ* of the subject of his statement, but only that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact.

When the facts proved on the part of the prosecution show that the respondent claimed to do the act resulting in death to the assailant in self-defence, the burden of proof rests from the first upon the prosecutor to show beyond reasonable doubt that the act was criminal.

It is error for the court to have any communication with the jury after a case has been submitted to them, and while they have it under consideration, except in open court.

It is also error for the court to furnish the jury a copy of the statutes of the state while they are out of court deliberating upon their verdict, that they may read certain provisions, designated by the court, touching the case under consideration.

The idea embraced in the expression that a man's house is his castle, is not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity, is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle in order to reach the inmate. In this view it is settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

On exceptions from the County Court of Franklin county. Defendant was indicted for manslaughter. In May, 1871, the prisoner, nineteen years of age, was living with his wife, mother and sister in a tenement house in the village of St. Albans. After he had gone to bed, Flanders and Watson, somewhat intoxicated, went to the house and rapped at the door. Defendant raised a chamber window and asked them what they wanted, and they said they wanted to come in. Talk went on between them, respondent telling them they should not come in, and they insisting that they would, and growing more violent, using abusive epithets and swearing at him, and threatening to smash in the door. He told them if they did not go away they would be made to go—they replying that he could not scare them, and if he would come down they would break in his head—and repeatedly threatening to smash in the door. One of them threw a brick or stone through the window. One started towards the door; whereupon the respondent went to another room and got a gun which was loaded with shot, and put the barrel on

the window-sill and fired, when Watson and Flanders ran away. Flanders died of wounds received from the shot.

The foregoing summary is what in substance the evidence on part of the respondent tended to prove. Respondent testified that he fired to the ground, and his object in firing was not to hit them but to scare them away.

A witness for the prosecution, to prove the dying declarations of Flanders, testified that he saw him after he was shot; that in answer to inquiries, he made statements concerning the occurrence connected with the shooting; that he was so weak that witness could not get a full or detailed statement of the affair from him; that he only got detached statements in the intervals between spells of vomiting; that he took his words on paper at the time to preserve his dying statements, but the paper was lost. To the allowance of this testimony exception was taken. The witness testified that Flanders said that he and Watson went to the front door of the house; he asked for admission to the house; a man opened the window above and asked them what they wanted; they said they wanted to get in; there were some words passed; he didn't let them in and some words passed, and he, Flanders, stepped back to where Watson was, and there was something said about shooting by the party in the house; there was some reply on their part; he didn't undertake to specify what it was; immediately thereafter the gun was discharged; he, Flanders, left then; that is the substance of all he said and very nearly the words he used.

The evidence on both sides was confined to the scene and occurrences in which the homicide took place.

After the jury had retired, they sent the following inquiry in writing to the court from their room by the officer who had them in charge: "What is the law in relation to manslaughter in the third degree, or what is the punishment for manslaughter in the third degree?" and the presiding judge of the court, while the court was in session, and the jury were in their room for deliberation, without the knowledge of the respondent, or his counsel, or the counsel for the state, sent to the jury in the room, and without bringing them into open court, the following communication in writing:

"There are no degrees in manslaughter under our laws; but the amount and kinds of punishment that shall be inflicted you will see is, with certain limitations, in the discretion of the court." And the court sent the General Statutes to the jury in the room and referred them to sect. 15, ch. 112.

This was made the subject of exception.

The foregoing is a sufficient statement to show the grounds of points embraced in the following opinion; though many other points of exception were argued. Respondent was found guilty.

Farrington & Benton, for respondent.

Ballard & Wilson, for the State.

The opinion of the court was delivered by

BARRETT, J.—I. It is objected in behalf of the respondent that the dying declarations of Flanders, as testified by Mr. Hill, should have

been excluded from the consideration of the jury, by force of the rule as stated, 1 Greenl. Ev., § 159, viz: "Whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended, by the dying man, to be connected with, and qualified by, other statements, which he is prevented, by any cause, from making, they will not be received." What we understand by the expression, that the statement "must be complete in itself," is not, that the declarant must state everything that constituted the *res gestæ* of the subject of his statement; but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact. This is plainly indicated by the closing part of the above quotation, as to the declarations made being intended by the dying man to be connected with and *qualified* by other statements, which he is prevented from making. There is no indication in the testimony given by Mr. Hill, that Flanders intended what he said to Hill should be qualified by anything that he wished to say, and was prevented from saying, or did not say. The fact that Mr. Hill had lost the paper containing the declarations in writing, does not bear on the question. It may have some bearing on the weight which ought to be accorded to the evidence thus given, as depending on the accuracy of his recollection, and his correctness in repeating from memory what Flanders said to him. But this, in that respect, is only the common case of comparative reliableness, as between the statement of facts orally from memory, and the statement of them in written memoranda made at the time the facts occurred.

The fact that Flanders made his statement in intervals between vomitings does not touch the question of the competency of the evidence, unless it should appear that, by such vomitings, he was prevented from expressing his meaning in relation to the facts he was undertaking to state. By recurring to the testimony of Mr. Hill, given in full in the Reporter's minutes, it will be seen that the facts are few and simple, about which the dying man undertook to speak; and there is nothing in their nature that would seem to require anything more to have been said in order to get the meaning he intended to convey in respect to them. The manner and circumstances of the making of the dying declarations are proper for consideration in giving effect to them as evidence in the case—much the same as if the deposition of the dying man had been taken, and given in evidence on the trial.

II. The court charged the jury that, "if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment * * * that the killing is presumed to be unlawful; and when the fact of killing is established it devolves on the party who committed the act to excuse that killing; to show that it was justified, in order to escape the legal consequences which attach to the commission of the act." In this we think there is error. As to the rule of presumption, as affecting the burden of proof, as it is ordinarily found in the books on criminal law, especially the older ones, it suffices to refer to the remarks of Ch. J. REDFIELD in *State* v. *McDonnell*, 32 Vt. 538–9. Yet, with reference to that rule, as it was applied in the present case, the statement of it in Foster's Cr. Law 225, is worthy of notice. "In every charge of murder, the fact of

killing being first proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, *unless they arise out of the evidence adduced against him;* for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In Roscoe, p. 20, that quotation is preceded by this statement, viz: "When a man commits an unlawful act, *unaccompanied by any circumstances justifying its commission*, it is a presumption of law that he acted advisedly, and with the intent to produce the consequences which have ensued." In *Yorke's Case*, 9 Met. 91, the meaning of the rule is peculiarly indicated by the manner in which Ch. J. SHAW stated it: "that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious, and an act of murder;" that meaning is made palpable and is illustrated by the same great judge in *Hawkins's Case*, 3 Gray 465, in which he says "that this was inapplicable to this (Hawkins's) case, where the circumstances attending the homicide were fully shown by the evidence." And on this point he instructed the jury that "the murder charged must be proved; the burden of proof is on the commonwealth to prove the case; all the evidence on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury upon all the circumstances are satisfied beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder; otherwise they will find the defendant guilty of manslaughter."

In *McKie's Case*, 1 Gray 61, on an indictment for assault and battery with a dangerous weapon, the subject of the burden of proof in that class of offences, was fully considered by the court, and instructively discussed by BIGELOW, J., in the opinion of the court drawn up by him. He says: "It appears that the justification on which the defendant relied, was disclosed partly by the testimony introduced by the government, and in part by evidence offered by the defendant; and that it related to, and grew out of the transaction or *res gestæ* which constituted the alleged criminal act." The result is stated thus: "But in cases like the present, * * * where the defendant sets up no separate independent fact in answer to the criminal charge, but confines his defence to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." Preceding this extract it is said, "Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offence alone, it is conceded that the burden is not shifted by proof of a voluntary killing, when there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide." Citing *York's Case*, *supra*, and *Webster's Case*, 5 Cush. 305.

We adopt the views thus shown, in their application to the present case, so far as to hold that with reference to the state of the evidence given on the trial, the jury should not have been instructed as they were in the parts of the charges above recited; but should have been instructed in substance that upon all the evidence they must find beyond

a reasonable doubt that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty, with proper adaptations of the instruction to this feature of the case as presented in the course and manner of the trial.

III. The exception to the communication of the presiding judge with the jury is maintained. The prevailing idea in this state has been that all communications between judge and jury after a case has been submitted to the jury, and while they have it in consideration, should be in open court, and, so far as we know, the practice has been conformable to this idea. In *Sargent* v. *Roberts et al.*, 1 Pick. 242, Ch. J. PARKER says: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and jury, after the cause has been committed to them by the charge of the judge, unless in open court, and when practicable, in presence of the counsel in the cause." See *Taylor* v. *Betsford*, 13 Johns. 487. As to furnishing the jury with a copy of the statutes, we regard the rule to be equally distinct and decisive, not only in this state but elsewhere: *Burrows* v. *Unwin*, 3 Car. & P. 310. In *Merrill* v. *Nary*, 10 Allen 416, a copy of the statutes was carried to the jury at their request and with the consent of the judge. This was held to be improper; and the proper views applicable to the subject are so amply set forth in the opinion delivered by Ch. J. BIGELOW, as to render it needless to do more than refer to that opinion.

IV. It is not deemed needful for the purposes of this case, with reference to its future prosecution, to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing on his right to kill, or to use deadly weapons in defence of it. This is presented in the third request for a charge in behalf of the respondent which is in the language used by HOLROYD, J., in charging the jury in *Meade's Case (infra)*, viz., that "the making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." The purpose of this request seems to have been to justify the killing with a gun as a lawful mode and means of defending the *castle*, as well as the person within it. Looking at the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders as a means of defending himself or his castle. It was claimed in behalf of the prosecution, and the evidence in that behalf tended to show that the gun was not fired at Flanders as a measure of force to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said: "The respondent testified that he fired to the ground, and the object in firing was not to hit them, but to scare them away." The respondent seems not to have regarded it as a case or a conjuncture in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house—whatever such assault in fact was—or to protect himself from any threatened or feared assault on his person. The gun loaded with powder alone would have served all the needs of the occasion, and of the exigency which he supposed then to exist and to press upon him. Nevertheless the point was made by said third request. It is indicated in the charge that the case, *State* v. *Hooker*, 17 Vt. 670, was invoked in support of it, and it is cited in this court

for the same purpose. That case professes to decide only the question involved in and presented by it, viz., whether it was criminal, under the statute, for the respondent to resist an officer in the service of civil process within his dwelling-house—such officer having unlawfully broken into the house for the purpose of making such service. The language of the opinion is to be interpreted with reference to the case and the question. That case, in no respect involved the subject of the use of a deadly weapon with fatal effect in defence of the castle; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject.

To come, then, to the subject as it is involved in said third request: In Foster's Crown Law 319, it is said: "The books say that a man's house is his castle for safety and repose to himself and family." In *Cook's Case*, Cro. Car. 537, an officer, with a *capias ad satisfaciendum*, went with other officers for the purpose of executing the same, to the dwelling-house of the respondent, and, finding him within, demanded of him to open the door and suffer them to enter. He commanded them to depart, telling them they should not enter. Thereupon they broke a window, and afterwards went to the door of the house and offered to force it open, and broke one of the hinges. Whereupon Cook discharged his musket at the deceased and hit him, and he died of the wound. "After argument at the bar, all the justices, *seriatim*, delivered their opinions that it was not murder but manslaughter; the bailiff was slain in doing an unlawful act in seeking to break open the house to execute process for a subject; and every one is to defend his own house. Yet they all held it was manslaughter; for he might have resisted him without killing him, and when he saw and shot voluntarily at him it was manslaughter." This was one of the earliest cases, and was fully considered, and it has been cited in all the books on criminal law since its decision in 1640, 15 Car. 1, with some incorrectness of statement in 1 Hale's Pl. Cr. 458, and in other books adopting his text. This is in some measure rectified by a remark in 1 East's P. C. 321, 322. See also Roscoe's Cr. Ev. 758; also 1 Bishop's Cr. L. note 2, § 858, 5th ed.

It is to be specially noticed that, what made it manslaughter was, that, in order to defend his castle, it was not necessary to kill the bailiff.

The same idea of *necessity*, in order to relieve the killing from being manslaughter, exists in the case of defending one's person, as stated in Hawkins' P. C. 113. "Homicide *se defendendo* seems to be where one who has no other possible means of preserving his life from one who combats him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity." In a learned note in 2 Arch. Cr. L. 225, it is said, "But when it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification; that he shall not, except in extreme cases, endanger human life or great bodily harm. * * * You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is therefore clear, that, if one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not

otherwise be prevented, he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he had killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own."

Harcourt's Case, 5 Eliz. stated in 1 Hale's P. C. 485–6, shows that this doctrine is not new. "Harcourt being in possession of a house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house; and Harcourt from within shot an arrow at those that would have entered, and killed one of the company, this was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without." What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

The idea that is embodied in the expression, that a man's house is his castle, is not that it is his *property*, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family, and to accomplish this, the assailant attacks the castle in order to reach the inmate. In this view it is said and settled, that, in such case, the inmate need not flee from his house, in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant if rendered necessary by the exigency of the assault.

This is the meaning of what was said by HOLROYD, J., in charging the jury in *Meade's Case*, 1 Lewin C. C. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, &c. * * * But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling-house, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and, therefore, in the eye of the law it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return, &c. * * * There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter, as where a party coming

up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he perhaps was justified in firing as he did; if you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter, and not of self-defence."

The sense in which one's house is his castle, and he may defend himself within it, is shown by what is said in 1 Hale's Pl. Cr. 486, that, "in case he is assaulted in his own house, he need not flee as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight."

Now set over against this what is said in 1 Russell 662, and the true distinction between the house as *property*, on the one hand, and as *castle* for protection, on the other, is very palpable, viz.: "If A., in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of life." P. 663. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of a dangerous or deadly weapon; more particularly if such violence is used after the party has desisted from the trespass." In *Carrol* v. *The State*, 24 Ala. 36, it is said, "the owner may resist the entry into his house, but he has no right to kill, unless it be rendered necessary in order to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm." Cited in 2 Bishop Cr. L. § 707, 5th ed. That case impresses us differently from what it does the learned author, as indicated by his remark prefacing the citation.

As developing and illustrating the prevailing idea of the law as to what will justify homicide *se et sua defendendo*, it is not without interest upon the point now under consideration to advert to what is said upon the general subject. In McNally 562, it is said, "the injured party may repel force by force, in defence of his person, habitation, property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger, and if, in such conflict, he happeneth to kill, such killing is justifiable." Wharton incorporates this into his work as text. The same is found in the older books: 1 Hale's Pl. Cr. 485–6; also in Foster's Crown Law 273, 1 Russell 667, and in other books *ad lib.* But to apprehend this in its true scope and application, it is important to have in mind what is said in 1 Russell 668: "The rule clearly extends only to cases of felony: for if one come to beat another, or take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet, if he kill him, it is manslaughter." * * * No assault however violent will *justify* killing the assailant, under a plea of necessity, unless there be a manifestation of felonious intent." See Archbold Cr. L. 221, cited 9 C. & P. 22.

This covers the cases of statutory justification of homicide, both under

our own and the English statutes; and in principle, and in reason, it is in keeping with the common law as to *se defendendo;* in defining the scope of which, in this respect, it is well laid down that, " before a person can avail himself of the defence, that he used a weapon in defence of his life, it must appear that that defence was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger :" 1 Russell 661.

The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial as against the respondent. If it were to be assumed that the defence might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent or doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and in fact did believe, that it was necessary, in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or to inflict great bodily harm, and the object of his attack (if there was such attack), upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case the point of justification is, that such use of fatal means was necessary in order to the rightful effectual protection of the respondent, or his family, from the threatened or impending peril.

We have been led to this discussion and exposition of the law as to the defence of the dwelling-house, on account of the somewhat fragmentary and disjointed condition in which it is done up in the books and cases of criminal law, and for the purpose of rendering as explicit as we are able the views of this court on that subject, as it has been brought into question and debate in the case in hand.

In this exposition, and in the views embodied in this opinion, all the members of the court concur.

The verdict is set aside and new trial granted.

We have no purpose of attempting to enlarge upon the legal discussion in the foregoing opinion, which seems to us altogether satisfactory, and will commend itself to the acceptance of the profession, as stating many nice and sometimes embarrassing questions, with great clearness and truth. There are one or two matters connected with the general taste of the times, affecting these questions, that we shall venture to advert to. The demand of the jury for further instructions by way of correspondence and the opportunity to discuss the statutes in their consultation-room, is something akin to many other things which have crept into jury trials with telegraphs and high schools and competitive examinations. It seems to be supposed by some, that those jurors, who come into the seats with their kid gloves on, and who occupy themselves, during the trial, in taking notes of the testimony, have made jury trials quite another thing from