personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be in a worse condition than all the rest of the world besides:" 3 Bl. Com. 18.

The plaintiff, by way of justification, says the estate was represented insolvent, commissioners were appointed, and her claim was submitted to them and by them rejected. The statute provides that any creditor, whose claim is wholly or in part rejected, may have the same determined at common law, in case he shall give notice thereof in writing in the office of the clerk of probate within forty days, and bring and prosecute his action within sixty days, after the report of the commissioners shall have been received. The plaintiff says she commenced the action against herself, because, if she had waited for the appointment of an administrator after the report was received, she would have lost her right of action under the statute by the delay. In this view, the case is a hard one. But it was not necessary for the plaintiff to delay resigning until the report was received. She might have resigned as soon as she knew the estate was insolvent, and she would have to submit her claim to the adjudication of commissioners. It is well for an administrator to resign when he finds the estate is insolvent, if he has a claim against it which is open to question; for, otherwise, he may be tempted to take advantage of his position, and favor himself at the expense of other creditors. We think the action cannot be maintained. The demurrer will therefore be overruled, and the plea in abatement sustained.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ILLINOIS.[2]
SUPREME COURT OF NEW HAMPSHIRE.[3]
SUPREME COURT OF OHIO.[4]

ADMIRALTY.

Collision—Steamer and Sailing-vessel.—A steamer held to be exclusively responsible for a collision with a sailing-vessel; the collision having occurred on a night when the stars were plainly visible, and when,

[1] From John Wm. Wallace, Esq., Reporter; to appear in vol. 23 of his Reports.
[2] From Hon. N. L. Freeman, Reporter; to appear in 77 Illinois Reports.
[3] From J. M. Shirley, Esq., Reporter; to appear in 56 New Hampshire Reports.
[4] From E. L. De Witt, Esq., Reporter; to appear in 26 Ohio St. Reports.

though a little haze was on the water, the night was to be called clear; there having apparently been some want of vigilance in the lookout of the steamer, who did not discern the sailing-vessel until the steamer was close upon her, at which time orders, which, as the result proved, tended to bring on a collision, were given on board the steamer: *The Sea Gull*, 23 Wall.

Collision—Two Steamers—Mutual Fault.—Two steam-vessels, one an iron steamship (an ocean vessel of twenty-five hundred tons), coming from sea up the Mississippi to New Orleans, and the other a small river steamer of one hundred and thirty-five tons, trading up and down the river below New Orleans from plantation to plantation, and carrying passengers, and getting market produce for the city just named, *held*, in a case of collision, to be equally in fault for running at full speed in a very dark and foggy night, after they had learned by signals from each other of their respective existences in the river, and while they were in doubt as to what respectively were their courses and manœuvres: *The Teutonia*, 23 Wall.

Collision—Sailing-vessels meeting.—The rule of navigation prescribed by the Act of Congress of April 29th 1864, "for preventing collisions on the water," which requires "when sailing-ships are meeting end on, or nearly so, the helms of both shall be put to port," is obligatory from the time that necessity for precaution begins, and continues to be applicable so long as the means and opportunity to avoid the danger remain: *The Dexter*, 23 Wall.

In a collision at sea, happening on a bright moonlight night, and when the approaching vessel was seen by the officer in charge of the deck long before the collision occurred, the absence of a lookout *held* unimportant; it being assumed that his presence would have done nothing to avert the catastrophe: *Id.*

AGENT.

Action by undisclosed Principal upon Contract of Agent—Entirety of Contract.—A, acting as the agent of B. and C., who were tenants in common of certain real estate, leased the same to the defendant by a contract not under seal, made in his own name, and did not disclose his agency or the state of the title to the premises demised: *Held*, that an action to recover the rent might be maintained in the name of B. and C.; *held*, also, that the contract was entire, and that the principals must join in the action: *Bryant* v. *Wells*, 56 N. H.

ARBITRATION. See *Estoppel.*

ATTORNEY.

Rights of Complainant—Duty of State's Attorney—Practice.—A complainant, who files a libel to procure the forfeiture of personal property for violation of law, and prosecutes the same wholly at his own expense, is entitled to do so without interference from the state's attorney: *State* v. *Tufts*, 56 N. H.

When such libel is prosecuted at the expense of the county, its direction will be taken charge of by the attorney-general or solicitor: *Id.*

A prosecuting officer will use his discretion, according to the circumstances of each particular case, whether to enter a *nolle prosequi*, or prosecute to final judgment: *Id.*

BANKER.

Money Deposit.—In case of a general deposit of money with a banker, a previous demand by the depositor, or some other person by his order, is indispensable to the maintenance of an action for such deposit, unless circumstances are shown which amount to a legal excuse: *Brahm* v. *Adkins*, 77 Ill.

BANKRUPTCY. See *Vendor.*

Discharge of Liens—Mortgage cannot be discharged by Sale without Notice to Mortgagee.—Although district courts of the United States, sitting in bankruptcy, have power to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and although as a general thing, if they order a sale so that the purchaser shall take a title so discharged the purchaser will have a title wholly unencumbered, yet to pass in this way an unencumbered title of property previously mortgaged, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way he have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien. And if a sale be made without any notice to him, his mortgage is not discharged: *Ray* v. *Norseworthy*, 23 Wall.

Supervisory Jurisdiction of Circuit Court.—A proceeding under the Bankrupt Act, in which by petition in form, the assignee sets forth articulately that A., B., C., &c., claim liens against the bankrupt's estate, the validity of each of which liens he, the assignee, denies, and in which he prays that the parties setting up the liens may be made parties, and be required to answer, each of them, all his charges and allegations as made, and be compelled, each of them, to set forth and state in their respective answers the particulars and facts upon which their respective claims are based, and that on final hearing all questions and rights of each and all the parties may be ascertained and determined by the court, and that the petitioner be directed to sell the estate and distribute the proceeds; and in which the assignee prays that he "may have such other and further relief in the premises, and may be further directed in his duties as the nature of the case requires;" in which proceeding, the parties asserting the liens answer in form and the assignee replies in form, is a "case in equity" within the eighth section of the Bankrupt Act, which gives an *appeal* to the Circuit Court in all cases in equity; and is not a case for the general superintendence and jurisdiction by that court given in the second section of the act, in cases where no provision for the supervision of the Circuit Court is otherwise made: *Stickney, Assignee*, v. *Wilt*, 23 Wall.

The fact that a subpœna is not prayed for, does not change this view; the defendants voluntarily appearing: *Id.*

If such a case be taken into the Circuit Court under this general superintending jurisdiction given by the said second section, it is wrongly taken. No jurisdiction exists there so to review the case. And no appeal lies to this court from the action of the Circuit Court made under such circumstances: *Id.*

Where a case has been so taken, and the decision reversing the decree of the District Court is in favor of the party taking it, this court will reverse the judgment or decree of the court below, and remand the suit with directions to dismiss it: *Id.*

But in the present case, where, owing to the lapse of time, the party who had the decision of the Circuit Court (reversing that of the District Court) against him, would be prevented from having, as matter of right, a review of the case by the Circuit Court on an appeal properly taken under the eighth section, this court thought it fitting to suggest that perhaps, on a proper application, the District Court would grant a review of the decree that *it* had rendered, which review, if granted, would lay the foundation, in case of an adverse decision, as before upon the merits, for an appeal in proper form to the Circuit Court: *Id.*

Jurisdiction of Circuit Court.—A petition addressed to the District Court "in bankruptcy sitting," by a person who has been decreed an involuntary bankrupt, "for a review of the record of the said proceedings in bankruptcy, and that the decree declaring the petitioner a bankrupt be set aside and vacated, and the petition of the petitioning creditor be dismissed and the petitioner's estate be restored to him; and for such other and further relief in the premises as may be equitable and just"—the orders and notices and every proceeding in the matter being entitled as in the original proceeding "in bankruptcy"—is but a petition filed in the original proceedings in bankruptcy; and is not a bill in equity to impeach the adjudication for fraud. It cannot be separated from the original proceedings and taken into the Circuit Court by appeal as a case in equity under the eighth section of the Bankrupt Act. If any action by the Circuit Court is wanted by the person decreed a bankrupt, he must obtain it under the second section of the Bankrupt Act, which gives a general supervisory jurisdiction to that court over the proceedings of the District Court, except where special provision is otherwise made. No special provision is made in such case for review by the Circuit Court. From any decision by the Circuit Court, acting in its general supervisory jurisdiction conferred by the second section, no appeal or writ of error lies to this court; *Sandusky* v. *National Bank*, 23 Wall.

Bills and Notes.

Ownership of.—Where the payee takes up a promissory note after its negotiation by him, the ownership, both legal and equitable, will return to him, and he may maintain an action thereon in his own name. He may in such case strike out the endorsements, or, if in blank, fill them up to himself: *Palmer* v. *Gardiner*, 77 Ill.

Fraud—Innocent holders.—A. made his promissory note, expressed to be for value received, whereby he promised to pay B., or bearer, forty dollars profits with interest, one year from date. As to A., the note was entirely without consideration, and was obtained from him by fraud. The plaintiff subsequently became the innocent *bonâ fide* purchaser thereof before maturity: *Held*, that the instrument in the hands of the plaintiff was a valid, negotiable promissory note, and might be recovered; that the word "profits," as to the plaintiff, did not express or suggest a contingency or uncertainty, but an absolute existing fund as the consideration of the promise, and on account of which the money

was to be paid; and that the word, as inserted in the note, was not such an apparent defect or infirmity as to put the plaintiff upon inquiry: *Matthews* v. *Crosby*, 56 N. H.

Remedy when Maker becomes part Owner.—Where a member of a firm made a promissory note to a third party, who endorsed the same, and the firm of which the maker was a member purchased the same, it was *held*, that the holders could not maintain any action thereon at law against the maker, but that it still remained a valid and binding indebtedness against the maker, which a court of equity would enforce: *Hall* v. *Kimball*, 77 Ill.

BOUNDARY. See *Stream.*

COLLISION. See *Admiralty.*

CONSTITUTIONAL LAW.

Jurisdiction of Federal Courts to Review State Courts—Practice.—Where, by the laws of a state, an appeal can be taken from an inferior court of the state to the highest court of the same, only with leave of this latter or of a judge thereof, and that leave has been refused in any particular case, in the regular order of proceeding—the refusal not being the subject of appeal to this court—a writ of error, if there be in the case a "Federal question," properly lies, under section 709 of the Revised Statutes, to the inferior court, and not to the highest one: *Gregory* v. *McVeigh*, 23 Wall.

A Federal question exists when—in a suit by a person who seeks to recover property on the ground that a judgment and execution on it by a court of the United States, interpreting a statute of the United States, has deprived him of the property in violation of the first principles of law—the defendant sets up a title under that judgment and execution, and the decision is against the title so set up: *Id.*

Conclusiveness of State Decisions on Questions of State Law—Eminent Domain—Public Use.—When the question is whether, under the constitution and laws of a particular state, a company professing to be a corporation, is legally so, this court will receive as conclusive of the question the decision of the highest court of the state, deciding in a case identical in principle, in favor of the corporate existence: *Secombe* v. *Railroad Company*, 23 Wall.

The taking of private property in order that a railroad may be made, belongs to the class of things which in proper cases are to be regarded as public necessities: *Id.*

The *mode* of exercising the right of eminent domain, in the absence of any provision of organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken: *Id.*

A judgment of condemnation rendered by a competent court, charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction: *Id.*

CONTRACT.

Fulfilment by Plaintiff—Alteration by Parties during Progress of Work.—Where a contractor, under a written agreement between them, constructed a house for and on the lands of the owner, substantially in accordance with the terms of the contract, as verbally changed in some respects as to size, form and material of some parts of the work, by consent of parties during the progress of the work, and leaving little only to be done to complete it; and the owner, during the progress of the work, had without objection made payments in pursuance of his agreement, as designated portions of the work were done, and had taken possession and was using the house for the purposes intended; in an action brought to recover a balance due on the contract: *Held*, first, that the plaintiff might recover without proving that the contractor had strictly performed the contract; second, that as to unfinished work, the plaintiff was entitled to recover the balance due at the contract price, less such sum as it would require to construct or complete the unfinished parts; third, that as to those parts, which by consent of both parties, during the progress of the work, had been constructed of materials and of size and form different from that required by the agreement, the plaintiff was entitled to recover the balance due at the contract price, less the difference in the value of those parts as constructed, and their value as the contract required them to be constructed: *Goldsmith* v. *Hand*, 26 Ohio St.

CRIMINAL LAW.

Larceny—False Pretences.—Where a contract for the loan of money is induced by the fraud and false pretences of the borrower, and the lender, in performance of the contract, delivers certain bank bills without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false pretences, but is not guilty of the crime of larceny: *Kellogg* v. *The State*, 26 Ohio St.

EMINENT DOMAIN. See *Constitutional Law.*

ESTOPPEL.

Statute of Limitations—Arbitration.—In 1864 the plaintiff and defendants referred all accounts, claims and demands existing between them to arbitration by a written submission. The time for making an award was enlarged by agreements written on the back of the submission from time to time until January 1st 1871. December 10th 1870, the arbitrators made an award which has been adjudged invalid by the court. In an action to recover the same indebtedness, which was presented to the referees and upon which their award was based, the defendants pleaded the Statute of Limitations: *Held*, that it was a question for the jury whether the plaintiff was induced not to commence a suit to recover his claim, during the time the matter was pending before the referees, by the defendants' agreement to refer, and abide and perform the award; and that, if this were so, the defendants are estopped from proving their plea: *Davis* v. *Dyer*, 56 N. H.

GUARANTEE.

Consideration—Notice.—To constitute a valid guaranty, there must be a sufficient consideration, a delivery by the guarantor, an acceptance

by the person to whom it is given, a subsequent delivery of goods or other property under and in accordance with its terms, and, if it is collateral, request of payment and notice of non-payment: *March* v. *Putney*, 56 N. H.

Notice is not necessary when the undertaking is absolute: *Id.*

Where the person for whose benefit the guaranty is given becomes insolvent, so that no advantage can arise to the guarantor, notice is unnecessary: *Id.*

Husband and Wife.

Statutory Validation of previous Conveyance of Land by Husband and Wife.—A. and wife, residents of the state of New York, executed a power of attorney to B. to sell lands in Minnesota territory of which A., the husband, was seised. The power was executed and acknowledged by both parties, the wife undergoing such separate examination as by the laws of New York makes valid the execution of deeds by a *feme covert*. At the time when this power of attorney was given there was no law of the territory authorizing such an instrument to be executed by the wife or the attorney to convey under it. B, professing to act for the two parties, sold and conveyed a piece of the land, then worth $3000, with general warranty, to C., for that sum, and A. received the money. The legislature of Minnesota subsequently passed an act by which it was enacted that "all deeds of conveyance of any lands in the territory, whether *heretofore* or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made by the original parties." The husband and wife afterwards revoked the power. The husband died, leaving a large estate composed entirely of personalty, the whole of which he gave to his wife. The wife now brought suit for dower in the land sold by B. as attorney for her husband and herself: *Held*, that the power of attorney was validated by the curative act, which the court, adverting to the fact that the husband had received the purchase-money for the tract, and that it had become part of his estate, and that the whole of it on his death passed to the wife, declares had a strong natural equity at its root, and accomplished that which a court of equity would have failed to decree against the wife, only because it would be prevented by the unbending law as to *feme coverts* in such cases: *Randall* v. *Kreiger*, 23 Wall.

Infant.

Purchase-money Mortgage—Cannot be avoided by.—Where an infant purchases a chattel, and, at the same time, in performance of the contract of purchase, executes to the vendor a mortgage on the purchased chattel to secure the payment of the purchase-money, he cannot, on the ground of infancy, avoid the mortgage without also avoiding the purchase: *Curtiss* v. *McDougall*, 26 Ohio St.

Where the mortgage in such case has been properly deposited, a subsequent purchaser of the mortgaged property from the infant takes it subject to the mortgage: *Id.*

Internal Revenue. See *Statute.*

Intoxicating Liquor.

Sale to Minor.—Upon indictment for selling intoxicating liquor to a

minor, without authority from his parents or guardian, it does not matter that the defendant did not know that such person was a minor. He is bound to know whether such person be a minor or not: *Farmer* v. *The People*, 77 Ill.

JUDGMENT. See *Constitutional Law.*

LANGUAGE.

English the only Legal Language where no other is specially Mentioned.—Where a statute of the state requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language is not a compliance with the statute: *City of Cincinnati* v. *Bickett*, 26 Ohio St.

LIMITATIONS, STATUTE OF. See *Estoppel.*

NATIONAL BANK.

Illegal Interest—Recovery back—Rights of Parties not affected by State Usury Laws.—The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money, does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made: *Higley et al.* v. *First National Bank of Beverly*, 26 Ohio St.

The rights and liabilities of the parties in such case are prescribed in the National Bank Act, and cannot be controlled by state legislation: *Id.*

Before judgment, the penalty allowed for the taking or receiving of usurious interest by a national bank does not bear interest: *Id.*

Surplus Capital of National Banks—Power of a State to Tax.—Chapter 49, section 5, of the General Statutes, subjecting the surplus capital on hand of banking institutions to taxation, is applicable to banks organized under the Act of Congress establishing national banks, approved June 3d 1864—13 Stats. at Large 111—as well as to banks established by the legislature of this state: *First National Bank* v. *Peterborough*, 56 N. H.

The taxation of the surplus capital of such banks, in excess of the amount they are required by said act to carry to their surplus fund semi-annually, is not prohibited by Congress, and is not an encroachment upon the constitutional powers vested in the Federal government: *Id.*

The taxation of such surplus by state authority is not the taxation of the means or agencies employed by the general government for the execution of its constitutional powers, but is the taxation of the property of such agents. The right to tax such property has never been surrendered by the states to the general government: *Id.*

RAILROAD. See *Constitutional Law.*

SHERIFF.

Sheriff's Return—May be contradicted.—The sheriff's return of service on original process does not in Illinois import absolute verity, but

is only *primâ facie* evidence of the truth of the matter therein recited, and consequently may be put in issue, before judgment, by plea in abatement: *Sibert* v. *Thorp*, 77 Ill.

STATUTE. See *Language*.

Interpretation by legislative Journals—Internal Revenue—Tax on Corporations.—Under the Internal Revenue Act of July 1870, which enacts that "there shall be levied and collected *for and during the year* 1871, a tax of 2½ per cent. on the amount of all interest paid by corporations, and on the amount of dividends of earnings *hereafter* declared by them," and which directs that such interest and dividends shall not, after the 1st of August 1870, be taxed under prior acts; interest paid and dividends declared during the last five months of the year 1870, are taxable, as well as those declared during the year 1871, it appearing that income of other sorts was meant to be so taxed, and there being no apparent reason why income derived through corporations should not be taxed like income generally: *Blake* v. *National Banks*, 23 Wall.

A badly-expressed and apparently contradictory enactment (such as the one above mentioned), interpreted by a reference to the Journals of Congress, where it appeared that the peculiar phraseology was the result of an amendment introduced without due reference to language in the original bill: *Id.*

STREAM.

Boundary—Middle Thread.—Where, in a deed of conveyance, the middle of a known stream is called for as the boundary line between adjacent proprietors, the thread of such stream, notwithstanding it may have been changed in its location by attrition and accretion, will control the courses and distances named in the conveyance, and will continue to be the boundary line between the lands of the respective proprietors: *Niehaus* v. *Shepherd*, 26 Ohio St.

SURETY.

Trust—Co-sureties.—The plaintiffs and the defendants, all but F., were stockholders in the White Mountains Railroad Corporation. The corporation was indebted to the extent of about $100,000, was insolvent, and the stockholders supposed themselves to be individually liable for its debts. The parties to this suit, and others, being desirous of relieving themselves from their liabilities, formed a plan, the object of which was to procure a discharge of those liabilities on the best terms practicable. In pursuance of this plan they executed bonds, and placed them in the hands of F., the condition of which was substantially as follows: "The condition of this obligation is and it is payable upon the performance of the following conditions and stipulations, viz.: The above bounden John G. Sinclair is to be discharged from all liability on a subscription, signed by him in 1855, for the purpose of purchasing the claims against the White Mountains Railroad, which has not been effected, and then the creditors of the White Mountains Railroad are to deposit with the said Farr legal and proper discharges or assignments of all their several claims against said corporation and its sureties, to be held by said Farr, in trust for and subject to the order of said creditors, until such an amount as may be necessary to pay the several sums that said creditors may agree to accept for their several claims against said

corporation and its sureties has been secured or pledged, to the satisfaction of said trustee, and then to hold said claims so assigned as aforesaid, for the use and benefit of all those who contribute towards the purchase of the same, for the purpose of compelling those stockholders in said corporation, who do not contribute anything towards making up the sum necessary to purchase said claims, to pay their proportion thereof;—now, whenever the said Farr shall be satisfied that all the claims against said corporation, or as near that as the nature of the case will admit, have been discharged or assigned as aforesaid, and held by him for the purposes aforesaid, and shall have notified us in writing of the same, which notices may be sent to us by mail if not given personally, then we are to pay to said Farr, or to his order, the penal sum named in the foregoing bond, within the time stipulated therein, with interest from the time of such notice—then this obligation shall be void:" *Sinclair* v. *Redington*, 56 N. H.

The defendant stockholders, having purchased in the outstanding liabilities of the corporation for about $10,000, succeeded in collecting about $30,000 from the corporation, and enough to indemnify them against all their outlays and expenses in the transaction. F., having given the notice mentioned in the foregoing condition, proceeded to put the bonds in suit for the benefit of the defendant stockholders: *Held*, that the relation of co-sureties existed between the plaintiffs and the defendant stockholders; that the debts, as against the plaintiffs, were discharged, and that the defendant stockholders had no claim against them but for indemnity, which they had already received; that the bonds were not collectible; that the trustee was *functus officio*, and should be enjoined from collecting the bonds: *Id.*

TAXATION. See *National Bank.*

UNITED STATES SUPREME COURT. See *Constitutional Law.*

USURY. See *National Bank.*

Mortgage—Interest on Interest.—Where one purchases land subject to a mortgage lien, and, as part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury: *Cramer* v. *Lepper et al*, 26 Ohio St.

Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent.: *Id.*

VENDOR AND PURCHASER.

Vendor's Lien—Bankruptcy—Statute of Limitations.—Where a party agrees to sell land to another, and, as consideration therefor, the vendee gives his promissory notes, payable at a future date named, and the vendor gives his bond conditioned that on the payment of the notes he will convey the premises in fee to the vendee, but makes no deed, the legal estate remains, until the payment of the purchase-money, in the vendor, and he has, by the law of those states where such liens are recognised, a "vendor's lien." The vendee has an equitable title only; one indeed which he can sell or devise, but one which, if the purchase-money is unpaid, he cannot sell so as to exclude the vendor's right to have payment of it. Any purchaser from the vendee who assumes to