table. Such a mistake could not occur however on the part of a careful observer. Even if inexperienced he would not think that he had made a new discovery and that therefore the *authorities* were all in the wrong.

From another case of Professor Freer's at the hospital, I have made two tables of 56 corpuscles. These average $\frac{1}{3353}$ and $\frac{1}{3256}$ of an inch respectively.

In order to understand clearly the distinctive difference in this matter of measurement of blood corpuscles, let us analyze two cases, and see how far we could trust the verdict which might be based upon them. For this purpose I will take one case in which the average measurement shall be the $\frac{1}{3200}$ of an inch, the other $\frac{1}{3300}$. It will be seen that if thirty-two hundred of the first were placed in a straight line they would occupy the space of an inch in length, while in the other case it would take just one hundred more to fill the same space; now by multiplying the first number into itself we get 10,240,000, the number occupying a square inch of surface, while in the second example it would take 10,890,000 to occupy the same area. Twelve of the first placed in a right line magnified 2000 diameters, would give six inches and a quarter as the length of the line, while the other twelve would show to the eye a line measuring just six inches in length, a difference appreciable by every one. Even one-half of this difference, produced by a magnifying power of 1000 diameters, would be *clearly* recognisable.

R. U. PIPER, M.D.

CHICAGO.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

WINFIELD S. PARTRIDGE v. HERMIONE HOOD.

At common law it was illegal to compound a misdemeanor as well as a felony. In Massachusetts a statute having provided when the prosecution of a misdemeanor may be compromised by leave of court, a compromise in such a prosecution is illegal unless such consent of court appears.

CONTRACT upon the following agreement, signed by the defendant, and dated October 5th 1874:—

"In consideration of one dollar and other good and valid consideration to me paid, I hereby agree, upon the delivery to me

and in my name, within three days from the date hereof, of a quit-claim deed, conveying the land described in a mortgage deed to Winfield S. Partridge given by Edward K. Hood, said quit-claim deed to be given by said Partridge and said land to be free of all encumbrances except a mortgage now held by the South Scituate Savings Bank for $1200, covering a portion of said land, to give said Partridge a first mortgage deed for $1250, payable in two years at eight per centum per annum, interest payable semi-annually, on my homestead estate situated on Essex street, Lynn, Mass. And also a power of sale first mortgage upon a portion of said land to be conveyed to me by said Partridge for $1000, payable in two years with interest thereon payable semi-annually at the rate of eight per centum per annum; said land being the westerly half of said land described in said mortgage from Edward K. Hood to W. S. Partridge."

The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son.

At the trial in the Superior Court, before BACON, J., without a jury, the following facts appeared: In August 1874, a complaint was entered in the Police Court of Lynn, against Edward K. Hood, for having mortgaged to the plaintiff in this action certain real estate in Lynn, without informing him of an existing encumbrance upon it. On this complaint, Hood was bound over to answer at the then next term of the Superior Court for the county of Essex. The land mentioned was the same as that referred to in the agreement declared upon. Upon the day before the grand jury met, one Silsbee, the plaintiff's agent, went to the house of the defendant, and, according to his own testimony, told her that if she would purchase the land of the plaintiff at what it cost him, he having sold under his mortgage and bought it in, "the matter," meaning the prosecution, "could undoubtedly be arranged." Under this inducement the defendant signed the contract. The defendant testified that she signed the contract to save her son from jail, and that Silsbee told her "the prosecution could be stayed." It further appeared that at the time of the trial the complaint was still pending in the Superior Court, never having been heard by the grand jury, and that no acknowledgment of satisfaction had been made by the plaintiff in court or elsewhere of the complaint; that the amount agreed to be paid by the defendant for the land was the

precise amount due by her son to the plaintiff at the date of the contract, and that the plaintiff thereby gave up to the defendant all the security he had for the amount.

The plaintiff contended that the arrangement testified to might be made under the Gen. Stats., c. 171, § 28, as preliminary to an acknowledgment of satisfaction, and that, at common law, such a misdemeanor might be compounded by the party injured if he received no more than his damages by the injury.

The judge found as a fact that the written agreement declared on was entered into by the defendant for the purpose of compounding said complaint, ruled that it was illegal and void, and ordered judgment for the defendant. The plaintiff alleged exceptions.

R. E. Harmon, for the plaintiff.

D. O. Allen, for the defendant.

GRAY, C. J.—The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our revolution extended it to all crimes: 2 West Symb., *Compromise & Arbitrement*, § 33; *Horton* v. *Benson*, 1 Freem. 204; Bac. Ab., *Arbitrament & Award*, A.; *Johnson* v. *Ogilby*, 3 P. Wms. 277; and especially the register's book cited by Mr. Cox in a note to p. 278: *Collins* v. *Blantern*, 2 Wils. 341; 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the crown, and subjected the appellee to damages only, like an action of trespass: *Blake's Case*, 6 Rep. 43 *b*, 44 *c*; 2 Hawk., c. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord KENYON; Kyd on Awards (Am. ed.) 64–68; *Drage* v. *Ibberson*, 2 Esp. 643; *Fallowes* v. *Taylor*, Peake Ad. Cas. 155; s. c. 7 T. R. 475, and by Mr. Justice LE BLANC'S suggestion of a distinction between a prosecution for a public misdemeanor and one for a private injury to the prosecutor: *Edgcombe* v. *Rodd*, 5 East 294, 303; s. c. 1 Smith 515, 520. This confusion was not wholly removed by the opinions of Lord

ELLENBOROUGH in *Edgcombe* v. *Rodd*, 5 East 294, 302; in *Wallace* v. *Hardacre*, 1 Camp. 45, 46; in *Poole* v. *Bonsfield*, Id. 55, and in *Beeley* v. *Wingfield*, 11 East 46, 48; of Ch. J. GIBBS in *Baker* v. *Townshend*, 1 Moore 120, 124; s. c. 7 Taunt. 422, 426; or of Lord DENMAN in *Keir* v. *Leeman*, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in *Keir* v. *Leeman*, 9 Q. B. 371, Chief Justice TINDAL, after reviewing the previous cases, summed up the matter thus: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise, founded on such a consideration, otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further."

In *Fisher* v. *Apollinaris Co.*, Law Rep. 10 Ch. 297, the plaintiff, pursuant to an agreement of the defendants to abandon a prosecution against him under St. 25 & 26 Vict., c. 88, for a violation of their trade mark, gave them a letter of apology, with authority to make such use of it as they might think necessary, and, after they had published it by advertisement for two months, filed a bill in equity to restrain them from continuing the publication, which was dismissed by the Lords Justices. The principal grounds of the decision appear to have been that the defendants had done nothing that the plaintiff had not authorized them to do; and that, even if the publication affected the plaintiff's reputation, a court of chancery had no jurisdiction to restrain it. See *Prudential Assurance Co.* v. *Knott*, Law Rep. 10 Ch. 142; *Boston Diatite Co.* v. *Florence Manufacturing Co.*, 114 Mass. 69. It was indeed observed that "it was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway:" Law Rep. 10 Ch. 302. But this obser-

vation was not necessary to the decision; and in *The Queen* v. *Blakemore*, 14 Q. B. 544, an agreement for the compromise of an indictment for not repairing a highway was held illegal and void. All the other recent English authorities support the judgment of Chief Justice TINDAL, above quoted: *The Queen* v. *Hardey*, 14 Q. B. 529, 541; *Clubb* v. *Hutson*, 18 C. B. N. S. 414; *Williams* v. *Bayley*, Law Rep. 1 H. L. 200, 213, 220.

In *Jones* v. *Rice*, 18 Pick. 440, 442, Mr. Justice PUTNAM, delivering the opinion of this court, after alluding to the English cases in the time of Lord KENYON, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said: "We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort, for his own use, money which properly should be levied as a fine upon the criminal party for the use of the Commonwealth."

It is true that the prosecution in *Jones* v. *Rice* was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offence whatever. Any act which is made punishable by law as a crime is an offence against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority: *Hinds* v. *Chamberlin*, 6 N. H. 225; *Shaw* v. *Spooner*, 9 Id. 198; *Shaw* v. *Reed*, 30 Maine 105; *Bowen* v. *Buck*, 28 Verm. 308; *People* v. *Bishop*, 6 Wend. 111; *Noble* v. *Peebles*, 13 S. & R. 319, 322; *Maurer* v. *Mitchell*, 9 W. & S. 69, 71; *Cameron* v. *McFarland*, 2 Car. Law Rep. 415; *Corley* v. *Williams*, 1 Bailey 588; *Vincent* v. *Groom*, 1 Yerger 430; Met. Con. 226, 227; 1 Story Eq. Jur., § 294.

The legislature of the Commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony), if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings may be ordered: Rev. Stats. c. 135, § 25; c. 136, § 27; Gen. Stats. c. 170, § 33; c. 171, § 28. Such an acknowledgment of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice: *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133. See also *State* v. *Hunter*, 14 La. Ann. 71.

In the case at bar, it being found as a fact that the agreement sued on was entered into by the defendant for the purpose of compounding a complaint against her son for a misdemeanor, and it not appearing that satisfaction has ever been acknowledged in or approved by the court in which the prosecution was pending, judgment was rightly ordered for the defendant.

Exceptions overruled.

That a contract to compound a felony is illegal is elementary law on both sides of the Atlantic. In addition to the cases cited in the opinion see also *Roll* v. *Raguet*, 4 Ohio 400; *Murphy* v. *Bottomer*, 40 Mo. 67; *Brown* v. *Padgett*, 36 Geo. 609. And it is not necessary to prove that in fact a felony has been committed. If a charge of felony is bonâ fide made, and the accused agrees to pay money to stifle investigation into the truth of the charge, the contract is as illegal as if the promisor were really guilty: *Chandler* v. *Johnson*, 39 Geo. 85.

Such contracts are not only invalid at law, but courts of equity have power to order their surrender and cancellation: *Loomis* v. *Cline*, 4 Barb. 453; *Porter* v. *Jones*, 6 Coldw. 313; where the subject is carefully considered. And not only is a note given on such consideration not binding on the maker, but the receiver also violates the law in accepting it. If, therefore, a person commits a larceny and subsequently gives his note for the value of the goods stolen, and the payee promises not to expose or prosecute him, the latter is thereby guilty of an indictable offence at common law: *Commonwealth* v. *Pease*, 16 Mass. 91.

Such a transaction was called in the early law "theft bote," and the party agreeing not to prosecute such a felony was considered an accessory after the fact. Indeed, the ancient Salic law "latroni eum *similem* habuit qui furtum velare vellet, et occultè sine judice compositionem ejus admittere." The old

rule of holding him an accessory to the principal felony was, however, so far afterwards modified as to render it a substantive crime, and punishable without any prior conviction of the other party (*People* v. *Buckland*, 13 Wend. 592), which could not be done, as is well known, at common law, so long as he was a mere accessory. Such was the familiar rule in all *felonies*. And, notwithstanding some intimations to the contrary in England as to some classes of *misdemeanors*, the same rule applies in America, for reasons so well stated by Chief Justice GRAY, in the principal case, to all offences of any grade punishable by public prosecution. And the contract not to prosecute need not be express; it may be implied. A mutual "understanding" to that effect is as fatal as a direct promise. See *Clark* v. *Pomeroy*, 4 Allen 534; *Conderman* v. *Hicks*, 3 Lans. 108, although both these cases were decided upon statutes. This implied understanding underlies the English statute of 7 & 8 Geo. 4, c. 29 (1827), re-enacted in stat. 24 & 25 Vict., c. 95 (1861), making it a penal offence to advertise for stolen property with an assurance of "no questions asked." A promise to make amends, however, for property stolen or embezzled, though grounded on an *expectation* merely that no prosecution would be instituted, is not invalid: *Ward* v. *Lloyd*, 6 M. & G. 785; and see *Ford* v. *Cratty*, 52 Ill. 313. But wherever a promise not to prosecute has been made, the note or contract of the adverse party to pay for the wrong done is not only invalid as an *executory* contract, but all mortgages given to secure it are equally void, and cannot be enforced either at law or equity; *Den* v. *Moore*, 2 South. 470; *Raguet* v. *Roll*, 7 Ohio 77; *Atwood* v. *Fisk*, 101 Mass. 363. But if money or other property has been actually paid or delivered on such an illegal contract, it cannot, for the same reason, be recovered back at law. Courts will not help the parties, but will leave them where it finds them: *Worcester* v. *Eaton*, 11 Mass. 376; *Dartmouth* v. *Bennett*, 15 Barb. 541; *Leonard* v. *Travis*, 6 Allen 130; *Dixon* v. *Olmstead*, 9 Vt. 310. Especially where the money paid is only an actual equivalent for the payee's loss: *Bothwell* v. *Brown*, 51 Ill. 234. And doubtless a pledge of personal property made to secure such promise of payment could not be recovered back at law by the pledgor any more than an actual payment: *King* v. *Green*, 6 Allen 139.

Not only are such contracts illegal when made *solely* in consideration of a promise not to prosecute, but if that be any part of the consideration of a note, the whole is void: *Shaw* v. *Spooner*, 9 N. H. 197; *Raguet* v. *Roll*, 7 Ohio 77; *Bowen* v. *Buck*, 28 Vt. 308; *Badger* v. *Williams*, 1 Chip. 137.

The question often arises whether such notes are valid in the hands of an innocent endorsee.

On the one hand there is some room for argument that such contracts are wholly void on the ground of public policy, and are not merely defective for want of a legal consideration. And the acknowledged principle that the promisee of such a negotiable note, by taking it for his own illegal promise not to prosecute the maker, has himself committed an illegal act, rendering himself liable to indictment and punishment, tends to support this view. These considerations apparently led the court of South Carolina to declare in *Bell* v. *Wood*, 1 Bay 251 (1792), that such a note was void by the common law. "The circumstance of this note," say they, "being in the hands of an endorsee ignorant of the original transaction, makes no kind of difference; for being void, in its original creation, for illegality and turpitude, it can never

afterwards be valid so as to charge the maker. Some notes are void by the common law, others made so by statute; there is, however, no essential difference between them. They are in both cases equally void, and without any binding efficacy on the maker. If then they are so, no good reason can be assigned why the holder of a note, made void by the common law, should recover, any more than the endorsee of a note made void by statute. In all these cases the common law and statutes use the same powerful language, to wit, that "*they never had a legal existence.*"

But, notwithstanding this express assertion, it must be admitted the case is hardly an authority to the point, since it there appeared that the note was endorsed a year after it became due, and was therefore open to the same defence as if in the hands of the payee; and besides, it seems to have been only a jury trial.

On the other hand, the desire to protect commercial paper, and the idea that the only defect in such a note is the illegality of the consideration, viz., the promise to stifle the prosecution, have led some courts to hold such notes valid in the hands of an innocent endorsee for value before maturity: *Clark* v. *Ricker*, 14 N. H. 44; *Wentworth* v. *Blaisdell*, 17 N. H. 275; *Hill* v. *Northup*, 4 N. Y. (Superior Court) 120.

Similar decisions have been elsewhere made on notes which were contrary to public policy, such as to pay for improper influence on legislative proceedings: *Meadow* v. *Bird*, 22 Geo. 246: *Thorne* v. *Yontz*, 4 Cal. 321; or to aid the rebellion: *Hatch* v. *Burroughs*, 1 Woods 448; or for gaming, when the statute does not make the contract absolutely void: *Haight* v. *Joyce*, 2 Cal. 64. See other instances in *Robinson* v. *Crenshaw*, 2 Stew. & Port. 276; *Grimes* v. *Hilderbrand*, 6 N. Y. (Superior Ct.) 620. The familiar rule being that if a note is expressly made null and void by a statute, it is so even in the hands of an innocent endorsee: *Lowe* v. *Waller*, 2 Doug. 736; *Unger* v. *Boas*, 11 Penna. St. 601; *Kendall* v. *Robertson*, 12 Cush. 156; but if the statute only makes *the consideration illegal*, the note is good in the hands of a bonâ fide holder. And strong words are necessary to have the effect to deprive the latter of a remedy against the maker. Thus, if a statute against liquor-selling declares that "all payments or compensations for liquors sold in violation of law should be held and considered to have been in violation of law, without consideration, and against law, equity and good conscience," a note given in payment for such liquors is not thereby invalid in the hands of a bonâ fide endorsee before maturity, without notice of such illegality: *Cazet* v. *Field*, 9 Gray 329. The simple word "void" would have had far more effect than all this periphrase.

EDMUND H. BENNETT.

Superior Court of New Hampshire.

GERRISH *v.* GLINES.

Where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper, *Held*, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a bonâ fide holder.

ASSUMPSIT, to recover the amount of two promissory notes, each dated July 15th 1872, and payable to O. J. Stickles & Co., or bearer, one for $66.74, six months from date with use, and the other for $250, one year from date with use, and each signed by the defendant. The action was sent to a referee by order of court, who at this term makes report that he finds due from the defendant to the plaintiff the amount confessed, and no more; and he reports his conclusions of fact and law as follows: "The plaintiff's writ is dated March 11th 1874, with general count, and the two notes above described were specified as plaintiff's claim, sought to be recovered in this suit. The defendant confesses the first note for $66.74; and as to the second note described for $250, says he never promised, &c. Reference to the writ, specification, plea and confession on file may be had. The plaintiff read said notes and put them in as evidence, and rested his case. On the back of said note for $66.74, is written and crossed as follows:—

"Demand notice waived.
"LEONARD GERRISH."

The other note for $250 was written on the back, "Demand notice waived. LEONARD GERRISH." The defendant offered to prove, did prove, and I find that when said defendant made and signed said note of $250, there was written on the same paper with said note, and under the defendant's signature to said note, and signed by said defendant and the payee of said note, the following, to wit, "Condition. This note is given on the following conditions: W. F. Glines, of the first part, agrees to work his territory faithfully and well; and O. J. Stickles & Co., of the second part, agree if W. F. Glines, of the first part, does not make one thousand dollars over and above what he pays for said territory, then the above note is void and of no effect. [Signed] O. J. STICKLES & Co., W. F. GLINES."

The plaintiff's counsel objected to the evidence of this condition, without showing first that the plaintiff had knowledge of it at the time he took or purchased said note. The evidence was ruled in, notwithstanding the objection, and the plaintiff took exceptions to said ruling. It appeared, from cross-examination of the defendant, that he did not "work all his territory faithfully and well," according to said condition, and from the plaintiff's testimony, without exception, that when he purchased said note, no such con-

dition was annexed to said note, and that he had no knowledge of this condition or agreement at that time, and that he paid a fair and full consideration for said note.

I find that said condition had been torn off, and before the plaintiff purchased said note. And I rule, under the foregoing facts, that such alteration avoided the note in the hands of an innocent endorsee, and that the plaintiff cannot recover said note in this suit under any view.

The questions of law thus raised were transferred to this court for determination by FOSTER, C. J.

Barnard, for the plaintiff.

Pike & Blodgett, for the defendant.

LADD, J.—Upon the facts found by the referee in this case, I am of opinion that his conclusions of law were correct, and that there should be judgment on the report accordingly. It is claimed by the plaintiff, in effect, that the note, and the condition written below it on the same piece of paper, are to be regarded as evidence of two distinct contracts, and treated as two separate instruments. I think that view cannot be sustained. The memorandum is entitled "Condition," and its first words are, "*This note* is given on the following conditions," &c. It seems to me beyond all question, that the condition is one part of a single entire contract, of which the note is the other; that the whole paper together must be treated as a single instrument, and that any division of it, whereby a negotiable promissory note, which had no legal existence before, was created, was such a material alteration as rendered the whole void; that it was, in fact, no less than a forgery, which would render the note thus brought into existence altogether void, even in the hands of a bonâ fide holder who paid a full consideration for it before maturity. The authorities, in this state and elsewhere, establishing the rule as to the effect of a fraudulent and material alteration or forgery of a negotiable promissory note, are too numerous and too familiar to require citation. My conclusion is, that the plaintiff cannot recover the $250 note, for both the reasons given by the referee.

CUSHING, C. J.—The note for $250, when issued by the defendant, was qualified by a condition annexed to it, and referring to it in such mode as to show that it was intended to remain

attached to it so long as it was in force, and probably until it was detached by consent of the defendant. The payment of the note was then dependant upon a contingency, and therefore the note was not negotiable: *Fletcher* v. *Blodgett*, 16 Verm. 26; *Fletcher* v. *Thompson*, 55 N. H. 408, and cases there cited.

Independently, therefore, of the effect produced upon the note by a material alteration, it is enough for this case that the action cannot be maintained in the name of this plaintiff. When the note was issued by the defendant it was not negotiable, and could not be made so without his consent. It appears to have been altered by tearing off the condition after it came into the possession of the original payee. It is not, therefore, the note which the defendant gave. He has a right to say *non in hæc fœdere veni*—I did not make this bargain. It is plain enough, in reason as well as in authority, that the endorsee in this case is in no better condition than the original payee. The maker of a *negotiable* note is bound by that note as he makes it, and against an innocent endorsee his defences are much restricted; but it is only the note which he actually made, and not a different note, which binds him in this way.

The case of *Johnson* v. *Heagan*, 24 Me. 329, is an authority to show that the removal of the written condition was a material alteration. It is not necessary, perhaps, to consider any further the effect of this alteration in avoiding the note. The cases of *Master* v. *Miller*, 4 Term 32; 2 H. Bl. 141; *Davidson* v. *Cooper*, 11 M. & W. 778; 18 Id. 343; *Powell* v. *Divitt*, 15 East 29, seem to show conclusively that the effect of such an alteration, made after the acceptance of the bill or giving the note, would not only be to avoid the note in the hands of an innocent endorsee, but also, if fraudulently done, to discharge the debt: *Gibbs* v. *Linabury*, 22 Mich. 479; *Benedict* v. *Cowden*, 49 N. Y. 396.

SMITH, J.—The principle, that the fraudulent removal of a memorandum originally attached to a note and qualifying the contract, constitutes a material alteration and destroys the note, is well established: *Benedict* v. *Cowden*, 49 N. Y. 376, and authorities there cited. The plaintiff is entitled to recover the amount confessed, and costs to the date of the confession, and the defendant is entitled to recover costs since that time.

Judgment accordingly.

The American cases on this head are all of recent date, and greatly resemble each other in the facts. A farmer is tempted by an offer appar-

ently advantageous to sign a conditional promissory note, or an instrument convertible into a promissory note. The condition is then torn off or the instrument altered, and sold to a bonâ fide buyer. The cases may be thus divided:—

I. Where no negligence is alleged in the signer of the instrument. Here the current of authority is that as the party did not intend to create a negotiable security, and the note sued upon is not the instrument given by him, there can be no recovery upon it; the condition being inseparable from the promise. In *Master* v. *Miller*, 4 T. R. 320, and the note thereto in Smith's Leading Cases, vol. i., pp. 1254, 1281, will be found the strongest statement of this doctrine. A material alteration of a promissory note made by the creditor after execution, and increasing or injuriously affecting the responsibility of the debtor, will avoid the note even in the hands of a bonâ fide holder, and although the alteration was such as to defy the closest scrutiny. The cases cited in *Gerrish* v. *Glines* are here in point; but it is remarkable that the question of negligence was raised in none of them. In *Johnson* v. *Heagan* and *Fletcher* v. *Blodgett*, the plaintiff was present at the signing of the note. In *Gibbs* v. *Linabay* and *Benedict* v. *Seaton*, the carelessness of the defendant was apparently never adverted to; and in the latter case ALLEN, J., delivering the opinion of the Court of Appeals, said: "The question whether the defendant by his act, negligent or otherwise, enabled the payee to commit a forgery and perpetrate a fraud on an innocent purchaser of the note, and, if so, as to the effect of such negligence or any want of proper care upon his liability on the note as altered by the severance of the memorandum, was not raised upon the trial, and cannot, therefore, now be made on this appeal."

II. But where on the pleadings or by the evidence the defendant's negligence sufficiently appears, it is for the court to sustain a demurrer to the plea or to give the jury binding directions. Thus, in *Douglass* v. *Matting*, 29 Iowa 498, where the defendant pleaded that he signed the instrument sued on believing it to be a duplicate contract of agency, not, however, alleging that he had read the contents, or that the note had been altered after signature, the demurrer was sustained by the Supreme Court, who held that the defence was insufficient, and the defendant had been defrauded "through his own gross negligence." That the burden is upon the defendant to show reasonable prudence is decided also in *Chapman* v. *Ross*, 56 New York 137, where a promissory note was signed as a duplicate contract of agency. The court below instructed the jury that if the paper sued on was never delivered as a note, the plaintiff must fail. This was held to be error, because it did not also appear that the defendant was guilty of no negligence. "It is necessary," said JOHNSON, J., "to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss." So in *Taylor* v. *Atchison*, 54 Ill. 196, where the case was tried by the court, and in *Nebeker* v. *Cutsinger*, 48 Ind. 436, the negligence or diligence of the defendant was regarded as a question of law, the facts being undisputed. In the former, where the decision was put upon a local act, the defendant, who could read with some difficulty, signed the paper handed to him without reading it. It was held that he was not negligent in so doing: but that the plaintiff was in fault in taking the note from a patent-right agent, with whom he had no previous acquaintance. In *Nebeker* v. *Cutsinger*, the jury found a verdict for the defendant; but on special interrogatories they answered on the evidence that he could

read, and if he had read the paper offered for his signature, would have discovered the fraud. It was held that the court below should have given judgment for the plaintiff on the answers to the interrogatories. See also *Nebeker* v. *Cochran*, 14 Am. Law Reg. N. S. 697. In *Shirts* v. *Overjohn*, 60 Mo. 305, it was laid down (overruling *Briggs* v. *Ewart*, 51 Mo. 245; *Martin* v. *Smylee*, 55 Id. 577, and *Corby* v. *Weddle*, 57 Id. 452, so far as they are in variance) that when it appears that the party sought to be charged intended to bind himself by some obligation in writing, and signed his name, having full means of ascertaining for himself the true character of such instrument before signing it, but neglecting to avail himself of such means, and relying on the representations of another, signed and delivered a negotiable promissory note, he cannot be heard to impeach its validity in the hands of a bonâ fide holder. In *Putnam* v. *Sullivan*, 4 Mass. 45, a distinction was set up *arguendo* between endorsing a note through fraudulent misrepresentation, and endorsing a different paper from that which the party intended to sign; but it was held, that, whatever there might be in the distinction, an endorser "cannot avail himself of it but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others."

The English authorities are to the same effect. *Young* v. *Grote*, 4 Bing. 420, may be considered as the leading case. A check was filled in by an agent in such a way as to admit of the amount being increased without exciting suspicion. It was held that the loss must fall upon the customer, as the bank had been misled through his negligence. BEST, J., quoted the general rule from Pothier that that one of two innocent persons shall suffer whose act occasioned the loss. *Swan* v. *North British Australasian Co.*, 2 H. & C. 184, virtually lays down the same rule, with the qualification that the negligence must be of some duty cast upon the party by law, and must be the proximate cause of the loss. In that case the plaintiff, who was a registered shareholder in the defendant company, signed and gave to his broker blank forms of transfer to be used in selling shares in another company. The broker not only filled in the forms fraudulently, but forged the attestations and stole the certificates from a locked box; *held*, that Swan had committed no such negligence as to estop him from bringing suit. The essential distinction comes out even more strongly by a comparison of *Ingham* v. *Primrose*, 7 C. B. N. S. 82, with *Scholey* v. *Ramsbottom*, 2 Camp. 485. In both cases negotiable securities were torn up by the maker, and afterwards picked up, pasted together, and fraudulently put into circulation. In the former case, however, it was held that the bonâ fide holder could recover, as there was nothing in the appearance of the bill to make a man of ordinary intelligence suspicious. Even if putting the halves together were a forgery, yet defendant by his conduct had led to plaintiff's becoming owner for value. But in *Scholey* v. *Ramsbottom*, where the rents were visible and the face of the check soiled and dirty, the holder was not allowed to recover. The question, therefore, is one of negligence, and of good faith as affected by negligence. In *Foster* v. *Mackinnon*, L. R. 4 C. P. 704 (1869), where the defendant endorsed a bill of exchange believing it to be a guarantee, the jury were directed that if defendant believed, &c., "and if he was not guilty of any negligence in so signing," he was entitled to a verdict. This was held a proper direction; but the jury having found for defendant, a new trial was granted because the verdict was against the weight of evidence on the question of negligence.

It follows that instructions which call

the attention of the jury from the question of negligence are misleading. In *Phelan* v. *Moss*, 67 Penna. St. 59, below the contract of agency was written a promissory note; and in *Zimmermann* v. *Rote*, 75 Penn. St. 188, a condition was written on the side of the note. In both cases the court below, who decided that the alteration in the note sued on amounted to a forgery, and directed the mind of the jury to the evidence on that head, were overruled and the negligence of the defendant and good faith of the plaintiff held to be the points at issue. See also *Garrard* v. *Haddan*, 67 Penna. St. 82.

If in the pleadings, however, circumstances of imposition are alleged which tend to exonerate the party from the charge of negligence, the court will not sustain a demurrer, as the question is one of evidence for the jury. Thus in *Cline* v. *Guthrie*, 42 Ind. 227, the defendant pleaded that he signed his name on a piece of paper to show the agents for a hayfork how it was spelt; that they wrote a promissory note over it, and when he picked the paper up and asked what that meant, they snatched it from him and drove away. A demurrer to this plea was sustained by the court below, but overruled by the Supreme Court, who placed their decision on the ground that the note was never made or delivered, and drew the distinction between cases where the maker "has actually and voluntarily parted with the possession of the note, and where he has not." See to the same effect *Burson* v. *Huntington*, 21 Mich. 415. This distinction appears to be chiefly important as bearing upon the question of negligence. In *Walker* v. *Ebert*, 29 Wis. 194, the defendant, a German, could not read or write English. Evidence that he signed the note sued on believing it to be a contract of agency, and that the note was never delivered, was rejected by the lower court; *held* to be error, and new trial awarded. The decision is carefully put upon the ground that the evidence tended to disprove negligence, and is distinguished from *Douglass* v. *Matting*, *supra*, on that score by DIXON, C. J.; though it may be doubted whether the signing of an instrument drawn up by a stranger in an unknown language is not in itself gross carelessness. In *Brown* v. *Reed*, 79 Penna. St. 370, the defendant offered to swear that he signed a paper which on its face was a contract of agency, so arranged that if a portion on the right side were cut off, there would remain a promissory note. *Held* to be error, as the question of negligence was for the jury, and depended on whether the line of demarcation between the parts of the instrument was distinct and conspicuous: per SHARSWOOD, J.

Whitney v. *Snyder*, 2 Lansing 477, is a case difficult to reconcile with the current of authority. The defendant offered to prove that he signed the note sued upon believing it was a contract of agency. The rejection of this offer by the lower court was held error. "There are and must be some defences," says TALCOTT, J., "as to which even a bonâ fide purchaser purchases at his peril;" and the question was whether the party "intended to sign and put in circulation the note as a negotiable security." The only reference to the question of negligence was, apparently, in the opinion of the court, the judge remarking that this was a stronger case in this respect for the defendant than *Foster* v. *Mackinnon*, *supra*, which has been relied on as authority.

It is submitted finally that the various distinctions laid down in regard to the cases where one or two persons innocent of intentional wrong must suffer, come down to a question of negligence in him whose act made the loss possible. If he has neglected a duty imposed on him by law, if he has not exercised ordinary diligence, the loss should fall

on him. Whenever the decision has been put on other grounds, such as that the defendant never made or delivered the instrument, that he never voluntarily parted with it, that his mind did not go with the deed, that the paper amounted to a forgery, &c., it will be found that these facts either tended to show the absence of negligence, or were essential because issue had not been made on such negligence. Thus in *Burson* v. *Huntington*, *Walker* v. *Ebert*, *Cline* v. *Guthrie*, *Brown* v. *Reed*, *supra*, the offer of the defendant was in effect to show that he had been reasonably diligent. Forgery and theft are probably extreme cases; yet it has been repeatedly laid down that a negotiable instrument stolen and put in circulation can be recovered on; and in *Ingham* v. *Primrose*, *supra*, the court intimate that a forgery which the defendant by his negligence had made possible would not be a ground of defence against a bonâ fide holder. In *Chapman* v. *Rose*, *supra*, the question was fully and carefully decided in a manner which appears to satisfy common sense and reasonably protect the holders of negotiable securities. R. S. HUNTER.

Supreme Court of the United States.

WASHINGTON COCKLE ET AL. *v.* JAMES W. FLACK ET AL.

Where a commission merchant in Baltimore advanced to a pork packer in Peoria $100,000, for which he was to receive interest at the rate of 10 per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business in connection with the use of money.

The express agreement of 10 per cent. is not usurious, because lawful in Illinois though not so in Maryland: *Andrews* v. *Pond*, 13 Pet. 65, re-affirmed.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

The opinion of the court was delivered by

MILLER, J.—Plaintiffs in error were engaged in the business of packing pork in Peoria, Illinois, and the defendants were commission merchants in Baltimore, in the fall of 1872, when the contract was made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business, and with reference to the packing business of the approaching season. This agreement was made by letter. The substance of it is that defendants should advance to plaintiffs as it was needed, the sum of $100,000, which they were to invest in the hog product, at the rate of 80 per cent. of the money so advanced, and 20 per cent. of the money put in to the purchase by plaintiffs. Defendants were to have interest on the money

advanced at the rate of 10 per cent. per annum. The product was to be shipped to them for sale, and they were to have 2½ per cent. commission on the amount if sold within sixty days, and 1 per cent. commission for every thirty days it was carried thereafter. The contract gave to plaintiffs the right to sell for themselves without sending to defendants, but the latter were to have their commissions all the same.

When the product had all been sold out and an account rendered, a balance was found to be due defendants in error, for which they brought this suit, and recovered a judgment of $7054.48.

It appears by the bill of exceptions that this balance was mainly if not wholly made up of the commissions charged on sales *not* made by defendants of products which never came to their possession, and the recovery was resisted on the sole ground that these commissions were a device to cover usurious interest.

The charge of the court to the jury on this point was to the effect that the transaction was not necessarily usurious; that defendants being engaged in the commission business, which required the use of money, might loan their money at lawful rates of interest to such parties, and on such terms that it would bring to them also the business which would grow out of the investment of it, that if the contract was made only with the honest purpose of securing in addition to interest, the profits incidental to handling the product as commission merchants, it was not usurious; that on the other hand such a contract might be used as a mere evasive device to cover usurious interest, and the charge left it to the jury to say from all the circumstances whether this were so.

There can be no question that on the general doctrine as to the line which marks the division between an honest transaction and a usurious cover, the charge of the court was correct, and that it is in this class of cases the province of the jury in jury trials, and of the chancellor in suits in equity to determine on a full consideration of all the facts whether it be the one or the other.

But counsel for plaintiffs in error argue that as to these commissions which defendants never earned by sale of the property or by handling it, and as to which they were put to no cost or inconvenience, there can be no other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive that the court ought to have held as matter of law that it was usury.

It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized the joint use of their money and their personal service, increased in value by their character for integrity and experience. To both these sources they looked for their profits, and they were necessarily united.

It was a necessity of their trade, and it was lawful for them while loaning their money at a specified rate of interest to stipulate with the parties to whom it was loaned for the incidental advantages of acting as commission merchants for the sale of the property in which the money was to be invested by the borrower. They had the right also to require as a condition of the loan that it should be invested in such property as would require their services in selling and handling it. All this is admitted.

We see no reason why the parties could not go a step further, and stipulate that if for any reason operating in the interest of the borrower, he should prefer to become his own broker or commission merchant, or to sell at home, he should pay the commission which the other had a right to contract for and receive. Like the port pilot, and other instances, they were ready and willing to perform. They had a place of business, clerks, and their own time and skill ready to devote to the plaintiffs' business. In that business they had a large pecuniary interest. They had loaned their money without requiring any other security than the obligation of the other party, except that which might arise from the property coming to their hands. To make this property a sufficient security the contract required of the plaintiffs that they should invest in the same property $20 of their own money to every $80 borrowed of defendants. The relinquishment of this right to control the sale of the property was a good consideration for the commissions which they would have made if they had sold it.

While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one, in aid of defendants' business, a business in which they were actually and largely engaged, and in which lending money was the mere incident and not the main pursuit.

It was, therefore, properly left to the jury to say whether, under all the circumstances it was or was not a usurious transaction, under instruction to which we can see no objection.

We do not think the express reservation of 10 per cent. interest

makes the contract usurious, because the law of Maryland forbids more than six. The contract was quite as much an Illinois contract where 10 per cent. is lawful as a Maryland contract, and the former is the law of the forum. The ruling of the court below was in accord with what this court had held in *Andrews* v. *Pond*, 13 Pet. 65.

The judgment of the Circuit Court is affirmed.

Supreme Judicial Court of Maine.

MARY S. STEVENS *v.* E. & N. A. RAILWAY.

Although the burden of proof falls upon a plaintiff to establish the negligence of a railroad company sued for an injury caused by their cars running off the track; still, where the plaintiff is guilty of no negligence, and the cause of the accident is not disclosed by the attending circumstances, the burden of explanation falls upon the company to show that there was no fault upon their part; and a jury would be authorized to presume them guilty of negligence if they fail to do so.

CASE brought to recover damages for personal injuries received on the defendants' railway, August 28th 1873.

It appeared in evidence that the plaintiff was a passenger on the car of the defendant company, getting on at Bangor; that the car, being about three-fourths full, proceeded about twenty-five rods from the depot at a rate of speed from five to ten miles an hour, and then went off the track, producing a slight shock. It did not appear that the car was damaged, or that any of the passengers, except this plaintiff, received any injury. The passengers left the car, the plaintiff, among others; and she walked to her house some four-fifths of a mile.

She testified that she was fifty-four years of age and in good health when she entered the car; that the train commenced slatting soon after the cars started, slat her from right to left, then stopped, jerked back, and then pitched forward; that her back was thrown against the back of her seat; that she was also pitched on to the back of the seat in front; that she at first fainted, and then recovered somewhat and was assisted out of the car; that by resting frequently on the way and receiving some support, she succeeded in reaching her home, took her lounge, had severe pain in the back, hip and head; sent for the doctor, took and kept her bed entirely for five days; that she got up very poorly; found she

had received severe internal injuries from which she had not recovered.

She introduced no evidence to show negligence on the part of the company.

On the part of the defence, evidence was introduced tending to show that the car was comparatively new, the wheels and axle had been little used, were purchased of a company having a high reputation, were constructed of the best known materials, and combining all the appliances which men skilled in the art of car construction employ; that the car and wheels and axle were duly and carefully inspected the night before and the morning when the train started; that the cause of the running of the car from the track was the loosening of the wheel; that this could not have been detected by the most careful examination; that the loosening of the wheel may take place when the wheel and axle have been manufactured with the highest degree of skill and of the best materials, and cannot be detected by the most careful inspection; cannot be detected either by the ear or eye; that it may be a latent defect not discoverable by the most careful examination and not possibly to be prevented by the highest skill in manufacturing.

There was evidence that, before the suit was brought, the defendants paid the plaintiff $275, and employed and paid a physician to attend her $250.

The verdict was for the plaintiff, $1625, which the defendants moved to have set aside as against law, evidence, its weight, and on the ground of excessive damages.

C. P. Stetson, for the defendants.

A. Sanborn, for the plaintiff.

PETERS, J.—The defendants move to have the verdict set aside. There is a single ground upon which the verdict may stand. The accident occurred within a moment after the cars left the depot in Bangor, destined for St. John. It happened by a wheel being loose upon the axle under one of the cars, the train being thrown from the track thereby. The questions at the trial were: first, whether the defect existed at the moment of starting, or whether it might have been produced while the cars were running afterwards; and if it existed before starting, whether it could have been discovered by the employees of the defendants by the use of

proper and sufficient care. The latter question was a close one. The burden of explanation, however, that falls upon a company in a case like this helps the plaintiff upon this point. Undoubtedly the general burden of proof is upon the plaintiff to show that her injury was caused by the negligence of the defendants. She avers it and must prove it. Nor, in a strict sense, does the burden of proof change: *Small* v. *Clewley*, 62 Me. 155. But it may be aided and sustained by a presumption that arises upon the facts.

Where a passenger is in the use of proper care when an injury happens to him by the cars running off the track, the cause of the accident not appearing from the attending circumstances, it has been frequently decided that negligence upon the part of the railroad company may be presumed against them, unless the imputation is removed by some satisfactory explanation upon their part. As the cars and the track are within the exclusive possession and control of the company, it is incumbent upon them to explain the cause of an accident, it not being ordinarily in the power of the passenger to do so. Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere requiring explanation. The maxim, *res ipsa loquitur*, applies in such a case: *Feital* v. *Middlesex Railroad Co.*, 109 Mass. 398, and cases there cited; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Co.* v. *Pollard*, 22 Wallace 341.

The question then comes, whether the explanation set up in this case is made out. If the defect existed at the depot before the train was put in motion, of which we think there was quite satisfactory evidence, were the jury justified in believing that it could have been there remedied by such caution and watchfulness on the part of the agents of the defendants as under the circumstances were required by common care? We are not convinced that the jury committed an error in this respect, giving the defendants the benefit of the interpretation of the rule as to common care, invoked by them and supported by the authorities by them cited. The defendant's witnesses do not swear positively that it was not within the limits of practicability to have discovered the defect before leaving the depot, if it existed then. The judgments of the experts are based upon the statement that a proper and sufficient examination had been made by the employees, the correctness of which statement may well be doubted. If there are no means of discovering such a defect, it is, certainly, a deplorable

risk for travellers. The truth is, that men who have routine work to perform often become careless. Undoubtedly defects may exist in the running-gear of railroads, not discoverable by any of the ordinary tests applied for their detection; but we are not satisfied that the jury erred in coming to the conclusion that such was not the case here.

Upon the question of the amount of damages, we are by no means free of doubt, whether the verdict should be sustained. There is much reason to believe that the injury may be grossly exaggerated, and there is some question whether the plaintiff had previous good health enough to warrant her travelling upon the road. But as the testimony is very conflicting, as bearing upon this branch of the issues tried, we are disposed to allow the verdict to stand. Motion overruled.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

Court of Chancery of New Jersey, February Term 1877.

MARIA MULOCK *v.* WILLIAM G. MULOCK.

In equity practice where the evidence has been closed it will not ordinarily be opened for newly-discovered testimony merely cumulative, but this rule is not imperative; it will be enforced subject to the discretion of the court.

Where the newly-discovered testimony is cumulative in character, but makes plain and certain what was doubtful before, so that the court can see that it may be material to a just decision of the cause and there has been no laches in the party offering it, it will be admitted.

Evidence is not to be deemed cumulative which is different in kind and character from what went before, such as admissions as distinguished from adverse testimony.

BILL for relief. Motion to admit newly-discovered evidence after publication.

John Whitehead and *D. R. Garniss*, of N. Y., for the motion.

T. N. McCarter, contrà.

RUNYON, Chancellor.—This suit is brought to set aside, on the ground of fraud, two deeds of gift made by the complainant in favor of the defendant (who is her son), purporting to convey to him valuable real estate. The complainant alleges that the deeds were obtained from her by the defendant through deception, which he was enabled to practice upon her by reason of the confidential

relations existing between them at the time. She is and then was a widow, and very old, and he was intrusted by her as her agent with the care of the property described in the deeds. The cause was referred to the vice-chancellor, and the evidence was closed on the 5th of April 1876. On the 14th of September following, the defendant applied for leave to examine three newly-discovered witnesses, whose testimony he alleges is material to the issue in the cause, and was not known to him until after the testimony was closed and very shortly before the application was made. The argument of the cause has not yet taken place; the testimony is of admissions alleged to have been made by the complainant about four years ago, and before the commencement of this suit, that she had conveyed her property to the defendant. The complainant's counsel insists that the established practice of the court forbids the admission of the testimony because the evidence in the cause is closed, and also because the testimony is merely cumulative. Its materiality to the issue cannot be doubted. It goes to the merits. The defendant has been guilty of no negligence in making his application. The existence of the evidence was first known to him after the testimony in the cause was closed, and no laches are imputable to him for not having discovered the evidence before the proofs in the cause closed. It is manifest that justice demands that, under the circumstances of the case, the defendant should be permitted to introduce the evidence unless it is merely cumulative or corroborative of what has not only been proved, but so proved as not to be unavailable to him by reason of want of positiveness, certainty or strength in the proof. It is urged, however, that to admit the testimony at this stage of the cause would be an innovation upon the long-established practice of the court, which, it is insisted, will not allow the introduction of new testimony as to the matters in issue after publication passed, except to prove an exhibit or the like. If, in order to reach a conclusion consonant with justice on this application, it were necessary to abandon the beaten path for the occasion, it would be done.

Precedents, however wise in their origin, and though hoary with antiquity, are not to be followed when they hinder justice. There would indeed be most notable incongruity in the refusal of this court to admit newly-discovered evidence merely on the ground that the testimony in the cause has been closed, when a court of law would, under the like circumstances, admit it. Especially will

the absurdity appear when it is considered that this court will grant relief against judgments at law on the ground that a fact material to the merits has been discovered since the trial (but too late to be available at law) which could not by ordinary diligence have been ascertained before. But no innovation is necessary in order to admit the testimony now offered; if it is of such a character that in justice it ought to be admitted, that end may be attained *per vias antiquas*. There is no rule forbidding absolutely and under all circumstances the introduction of new evidence on a rehearing. Such indeed is the general rule, but it has exceptions: Gresley's Eq. Ev. 198, 199; Seaton on Dec. 3. The practice is thus stated in Harrison's Chancery Practice (1767), p. 46: "Though the general rule be that after publication no new witness can be examined, nor a witness before examined, yet upon special circumstances set forth by affidavit the rule may be dispensed with, nor are the exceptions limited to the proving and admission of exhibits or even documentary evidence generally." In *Newland* v. *Horsman*, 2 Chan. Cas. 75 (1681), a new commission to examine witnesses as to new matters arising on the hearing was granted. In *Needham* v. *Smith*, 2 Vernon 463 (1704), it was said that if after hearing a witness is convicted of perjury, advantage may be taken of the fact on a rehearing. In the case of *The Mayor and Aldermen of London* v. *The Earl of Dorset*, 1 Chan. Cas. 228, upon a commission of charitable uses, the question on appeal was whether certain houses were part of Bridewell belonging to the city for the relief of the poor, or a part of Dorset House, which point was referred to law to be tried and then to report; motion was made for a commission to examine an aged witness who was not discovered until that time, and who was unable to travel. It was said that if she were able to travel she would be examined at the trial, and it was urged that, though publication on hearing was passed, yet the question being a freehold, and not properly triable at law, it was reasonable that the testimony, the loss of which might occasion the loss of the land, should be preserved. The motion was opposed because publication had passed. The Lord-Keeper remarking that the rule against examining after publication had been strict, said the court was the judge, and ordered the commission and examination.

Says GILBERT (For. Rom. 180): "Upon a rehearing any exhibit may be proved *viva voce* as upon the original hearing, but no

proof can be offered of any new matter without special leave of the court, which is seldom granted." Said Lord ELDON, in *Willan* v. *Willan*, 19 Ves. 590, 592: "It is perfectly established that after publication, previous to a decree, and depositions have been seen, you cannot examine witnesses farther without leave of the court, which is not obtained without great difficulty, and the examination is generally confined to some particular facts." In *Gregory* v. *Marychurch*, 12 Beav. 275, the plaintiff after publication discovered material evidence, "an admission by affidavit," and leave was given on motion to introduce it and examine witnesses accordingly, not only with leave to the defendants to cross-examine, but with suggestions as to the mode in which they might introduce counter testimony. In *Prevost* v. *Gratz*, 1 Peters C. C. 364, 379, application for rehearing was made on the ground of newly-discovered evidence not documentary. Judge WASHINGTON, expressing the strongest disposition to grant the motion because he was satisfied that the justice of the case would be promoted by so doing, nevertheless denied it, but the denial was put on the ground of laches. Again, a bill of review may be filed, with consent of the court, upon newly-discovered testimony in reference to the matters in issue in the cause, not merely documentary evidence only, but other evidence also: Cooper's Eq. 91; *Hubbs* v. *Livingston*, 3 Johns. Ch. 124; Story's Eq. Pl., sects. 412, 413.

It is true that in *Brumagim* v. *Chew*, 4 C. E. Green 337, Chancellor ZABRISKIE said that on a rehearing only such evidence as was or could have been read on the hearing could be heard, but this was evidently intended as an enunciation of the general rule. The application in that case was to admit new evidence as to what was, in fact, the law of New York as to the effect of judgments of the courts of that state, to show that the law was different from what appeared on the hearing.

Judge STORY indeed, in *Wood* v. *Mann*, 2 Sumn. 316, where testimony similar to that now under consideration was offered under like circumstances and rejected, expressed an opinion that after publication it would be better to exclude all testimony of newly-discovered witnesses to any facts in issue unless connected with some newly-discovered documents, but at the same time he recognised the fact that such is not the rule. He carefully states the facts as follows: "There is no universal and absolute rule which prohibits the courts from allowing the introduction of newly-

discovered evidence of witnesses to facts in issue in the cause after publication and knowledge of the former testimony, and even after the hearing, but the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause." The rule was founded on the public policy of suppressing perjury and preventing the fabrication of evidence to meet the exigencies of the cause after the full bearing and weight of the testimony are understood by the parties: Gilb. For. Rom. 118, 119. But by the methods of modern practice in equity, the testimony is fully known to the parties, as it is put in and they are apprised of its qualities and character, its weakness or its strength, and its bearing on the case before publication, quite as completely as they would be in a trial at law.

This consideration deprives the rule itself of much of its force in modern application, and again, when the nisi prius character of the trial of causes before the vice-chancellor is considered, there is absolutely no ground for the application to the subject in connection with such trials of a different rule from that which would govern it at law. Speaking generally, neither equity nor law will relieve where the newly-discovered facts are merely cumulative or corroborative, but the rule admits of exception, and neither law nor equity will refuse relief where the evidence, though cumulative, will make plain and certain that which was before mysterious and doubtful. So that if it be received the most obvious justice will be done, and if rejected the most palpable injustice: 3 Gra. & Wat. on N. T. 1064. It may be that testimony to the same effect as that which is made the ground of the application has been given in the cause, but it may have been so slight as to have been therefore unimportant. It may have been the mere adumbration of a most important fact which, if fully proved, would have turned the scale. The applicant may have been unable from want of knowledge of the means or sources of proof to establish the fact on the trial, and the evidence may have come to him by the merest accident almost immediately afterwards. To say that because evidence to the same effect was given in the cause, though it was too weak to be of any value (but yet the best within the applicant's knowledge or reach at the time), strong and, it may be, thoroughly conclusive testimony subsequently discovered shall not

avail him merely because of a rule which is within the control of the court, would be to do injustice judicially and with deliberation.

If the newly-discovered evidence is of a different kind and character from that adduced on the trial it will not be liable to the objection that it is cumulative: *Guion* v. *Butts*, 4 Wend. 579; *Gardner* v. *Mitchell*, 6 Pick. 114; *Watts* v. *Howard*, 7 Metc. 478, 480.

In the case before me the newly-discovered evidence consists of statements made by the complainant to the witnesses that she had conveyed the property in question to the defendant. The evidence of admissions in the cause is very slight, and is not of the same kind as that which is now offered. There can be no doubt of the importance of the testimony to the defendant. The complainant's case is based on her ignorance of the character of the deeds which she executed, by which the property was conveyed to her son, the defendant.

If, then, the newly-discovered evidence now offered is of a character such as, under like circumstances, would be ground for a new trial in an action at law, why should it not under the circumstances be admitted here? If there had been a trial at law, in an action at law, between these parties, resulting in a judgment against the defendant, and he had discovered the evidence only when too late to avail himself of it at law, this court would have relieved him on that ground. And shall it be said that its practice constrains it to perpetrate the injustice against which it would grant relief if it occurred in another forum? The admission of the evidence is within the discretion of the court, and there it should rest in order to guard against imposition on the one hand, and a failure of justice on the other.

The testimony will be opened, under the direction of the vice-chancellor, to admit the newly-discovered evidence, and to give the complainant opportunity to meet it by counter evidence.

Supreme Court of Michigan.

EDWARD SMITH *v.* ALLAN SHELDON ET AL.

After the dissolution of a partnership, even if it be conceded that the liquidating partner has authority to give an acknowledgment of debt in the firm name, yet he has no authority, by implication of law, to give a note in the firm name, which increases the amount of the indebtedness, or extends the time of liability, or in any way amounts to a new contract.

After the dissolution of a partnership, if one partner buys out the interest of

the others, and agrees to assume the debts, he becomes, as between the parties, the principal debtor, and the retiring partners merely sureties, and creditors of the firm having knowledge of this equity are bound to regard it in their subsequent dealings with the parties.

Where, after the dissolution of a firm under such circumstances, a creditor accepted from the liquidating partner, without the knowledge of the others, a note in the firm name, with interest at a special rate, the retiring partners were thereby discharged from the original debt.

This result was not varied by the fact that the note was at very short time, one day, where the agreement for a high rate of interest showed an intention to give indulgence beyond the time named, and such indulgence was, in fact, given until the principal debtor became insolvent. These facts, while legally immaterial, have a strong bearing on the equities, by showing that the creditor bargained for an advantage that the sureties were not to share, and therefore they could not be compelled to share the risk.

ERROR to Wayne Circuit.

Prior to June 1867, Edward Smith, Isaac Place and Francis B. Owen, were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969, on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his co-partners, and agreeing to pay off the partnership liabilities, including that to the defendants in error.

On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest.

Place, in 1872, became insolvent, and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered, which this writ was brought to reverse.

C. & W. N. Draper and *C. I. Walker*, for plaintiff in error, cited *Stephens* v. *Thompson*, 28 Vt. 77; *Harris et al.* v. *Lindsay*, 4 Wash. C. C. 98, 271; *Smith* v. *Rogers*, 17 Johns. 340; *Mouldon*

v. *Whittock*, 1 Cow. 290; *Rosseau* v. *Call*, 14 Vt. 83; *Waydell* v. *Luer*, 3 Denio 410; *Livingston* v. *Radcliff*, 6 Barb. 244; *Van Eps* v. *Dillaye*, 6 Barb. 532; *King* v. *Lowry*, 20 Id. 532; *Thurber* v. *Corbin*, 51 Id. 215; *Colgrove* v. *Tallman*, 2 Lansing 97; *Wilson* v. *Lloyd*, Law Rep. 16 Eq. 60.

E. W. Meddaugh, for defendants in error.

1. Nothing short of an express agreement by creditors will discharge retiring partners: Parsons on Partnership 421; Story on Part., sects. 154–6; Collyer on Part., 5th Am. ed., sects. 487, 563.

2. The promissory note of a third person, taken for an antecedent debt, is not a payment unless by agreement: *Johnson* v. *Weed*, 9 Johns. 310; *Foley* v. *Barber*, 5 Id. 68; *Jaffray* v. *Cornish*, 10 N. H. 505; *Davidson* v. *Bridgeport*, 8 Conn. 472.

3. Taking note of another than the debtor is an extinguishment of the debt *only* when so agreed: *Jewitt* v. *Pleak*, 43 Ind. 368. *Devlin* v. *Chamblin*, 6 Minn. 468; *Hotchin* v. *Secor*, 8 Mich. 494; *Dudgeon* v. *Haggart*, 17 Mich. 273. This involves the principle under discussion. The question in both instances is, the creditor having taken an obligation other than that of his debtors, whether or not he thereby has lost his remedy against them. The rule for determining this should be the same in both.

4. A note of the surviving member of a firm, given in adjustment of a creditor's account against the firm, will not be deemed a payment of the account unless such is shown to have been the agreement: *Leach* v. *Church*, 15 Ohio St. 169; *Bowen* v. *Still*, 49 Penn. St. 65; *Van Eps* v. *Dillaye*, 6 Barb. 244; *Spear* v. *Atkinson*, 1 Ired. 262; *Thompson* v. *Briggs*, 28 N. H. (8 Foster) 40; *Powell* v. *Charless*, 34 Misso. 485; *Keerl* v. *Bridgers*, 18 Miss. (10 S. & M.) 612; *Sneed* v. *Wiester*, 2 A. K. Marsh. (Ky.) 277; *Rayburn* v. *Day*, 27 Ill. 46; *Tyner* v. *Stoops*, 11 Ind. 22; *Bonnell* v. *Chamberlin*, 26 Conn. 487; *Smith* v. *Rogers*, 17 Johns. 340. This question is touched upon in *Botsford* v. *Kleinhaus*, 29 Mich. 332.

That the *mere* acceptance of the promissory note of a less number than all of the joint debtors will not discharge the joint liability, see *Drake* v. *Mitchell*, 3 East 251; *Tobey* v. *Barber*, 5 Johns. 68; *Johnson* v. *Weed*, 9 Johns. 310; *Thompson et al.* v. *Percival*, 5 B. & Ad. 925; *Reed* v. *White et al.*, 5 Esp. 122; *Evans* v. *Drummond*, 4 Id. 92; *Harris* v. *Farwell*, 15 Beav. 31.

The cases cited by plaintiff in error are all distinguishable.

Most of them are merely affirmations of the rule that the acceptance of the note of one partner will be a discharge of the others *if such is the agreement* of the creditor accepting it. This is conceded, but it does not reach this case, where there was no such agreement.

The opinion of the court was delivered by

COOLEY, C. J.—The position taken by the plaintiffs below was that, as they had never received payment of their bill for merchandise, they were entitled to recover it of those who made the debt; the giving of the note which still remained unpaid being immaterial. On behalf of Smith it was contended that by the arrangement between Place and his co-partners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor, and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability; and it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:—

1. Was the note given by Place in the co-partnership name for the co-partnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the payment tha when a co-partnership is dissolved, the partner who is entrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due bill or I. O. U., we are satisfied that there is no good reason for recognising in the partner who is to adjust the business of

the concern, any implied authority to execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness, and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future, if the partner entrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in *F. & M. Bank* v. *Kercheval*, 8 Mich. 506, 519, that the law was well settled that no such implied authority existed; and we are not aware that this has before been questioned in this state. See *Pennoyer* v. *David*, 8 Mich. 407. We think it much safer to require authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion, new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative positions of the several parties as regards the partnership debt. Place by the arrangement had agreed to pay this debt and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collection from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the credit is or is not contracted within the two capacities, as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors, and may be known to the creditor or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one

party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the co-partnership seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for the purpose, the duty of Place to indemnify and the right of Smith and Owen to demand indemnity were clear. Every element of suretyship is here present; as much as if, in contracting an original indebtedness, the contract itself has been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakeley* v. *Passeller*, 4 Cl. & Fin. 207; *Wilson* v. *Lloyd*, Law Rep. 16 Eq. Cas. 60, and *Midlard* v. *Thorn*, 56 N. Y. 402.

And it follows as a necessary result from what has been stated that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties and as the event has proved indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the vice-chancellor in *Wilson* v. *Lloyd*, Law Rep. 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in *Fellows* v. *Prentis*, 3 Denio 512, where the surety was also held discharged, and see *Okie* v. *Spencer*, 2 Wheat. 253.

But that indulgence beyond the time fixed was contemplated when the note was given, is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction; and in most cases it works substantial justice.

The judgment must be reversed with costs, and a new trial ordered.

Supreme Court of Indiana, March 1877.

JAMES STANLEY *v.* SUTHERLAND & KEARNS, Adm'rs.

A court of bankruptcy has no authority to order the sale of property alleged to belong to a bankrupt, where it is in possession of another person claiming to be the owner.

Section 5063 of the Revised Bankrupt Act relating to the sale of disputed property and holding the proceeds to abide the result of the determination of title, does not extend to cases where another person is in possession under claim of title.

In cases to which that section does extend there must be notice to the claimant, and without it the proceeding would be void as to him.

Property in the possession of A. under claim of title was seized by the sheriff under an execution from a state court as the property of B. A petition in bankruptcy was then filed against B. and subsequently an order was made by the Bankruptcy Court on the sheriff to deliver the property to B.'s assignee, which he did. An action against the sheriff for trespass in taking the goods from him was brought by A. after the petition in bankruptcy had been filed against B., but before the order to the sheriff to deliver the goods to the assignee. *Held*, that the delivery of the goods to the assignee under the order of the Bankruptcy Court was no defence to the sheriff in such action.

In such an action it appeared that plaintiff's title was by purchase from the bankrupt with some knowledge of his affairs: *Held*, that the question was not whether the title of plaintiff was invalid under the Bankrupt Act, but whether it was good or not under the state law. Neither the assignee nor any one entitled to question the validity of the sale under the Bankrupt Act being party to the action, the Bankrupt Act had no application whatever.

From Cass Circuit Court. This was an action by George C. Sutherland against the appellant, Stanley, to recover a stock of goods or the value thereof, a schedule of which was set out, alleged to belong to the plaintiff and to have been in his possession, and to have

been wrongfully and unlawfully taken from the plaintiff by the defendant, and converted to his own use. Issue, trial by jury, verdict and judgment for the plaintiff.

M. Winfield and *S. T. McConnell*, for appellant.

D. P. Baldwin and *D. B. McConnell*, for appellees.

The opinion of the court was delivered by

WORDEN, C. J.—The appellant has assigned the following supposed errors:—

1. The court erred in overruling the demurrer to the complaint.
2. The court erred in overruling the demurrer to the fifth paragraph of reply.
3. The court erred in overruling the motion for a new trial.
4. The court erred in rendering final judgment for the appellee.

We do not discover any objection to the complaint, and as none is pointed out in the brief of counsel for the appellant we assume there is none.

We take the following statement of the other pleadings involved from the brief of counsel for the appellant:—

"The first paragraph of the supplemental answer is in the nature of a plea in abatement verified. It alleges that the defendant seized the goods as sheriff on a writ of attachment issued against the property of William Sutherland; that Sutherland was subsequently adjudicated a bankrupt on the petition of his creditors; an assignee was appointed, who obtained an order from the Bankrupt Court on him for the delivery of the goods; and on demand of the assignee, and in obedience to the order of the Bankrupt Court, he surrendered the goods to him, who still holds them, subject to the claims of the plaintiff, which he is ordered to and may assert in that court, and he asked that this suit abate until then.

"A demurrer was overruled to this plea, and George replies that he was not a bankrupt; that he purchased the goods in good faith from the bankrupt without reasonable cause to believe him insolvent; that the conveyance to him was a preference of an honest debt, and such a preference as was lawful under the laws of the state; that he was no party to the bankrupt proceedings and had no notice thereof. A demurrer was overruled to this reply and exceptions taken.

"The ruling on the demurrer to the reply was in effect a sustaining

a demurrer to the plea in abatement, and holding it simply a plea in bar. This demurrer ought to have been sustained; and if the facts contained in the plea of abatement were proven, the suit ought to have abated. The facts alleged in the reply would not evade that issue."

It may be proper here to state some dates not appearing in the foregoing statement of the pleadings.

The writ of attachment against William Sutherland was issued on or about May 1st 1870, on which the goods were seized by the defendant.

On May 7th 1870 the petition in bankruptcy against William Sutherland was filed.

On May 10th 1870 this action was commenced.

On June 3d 1870 William Sutherland was adjudged a bankrupt.

On March 14th 1871 the assignee was appointed, and on April 26th 1871 the order for the delivery of the goods by the defendant to the assignee was made.

We are of opinion that the answer sets up no legitimate matter, either in abatement or in bar of the action, and therefore that the court committed no error in overruling the demurrer to the reply. The reply was good enough for the answer.

The answer goes upon the theory that as the defendant, as sheriff, seized the goods as the property of William Sutherland at the suit of attaching creditors, and as William Sutherland was afterwards adjudged a bankrupt; and as the Court of Bankruptcy had afterwards made an order for the delivery of the goods by the defendant to the assignee, which had been done in pursuance of the order, this suit ought to abate, and the plaintiff should prosecute his claim to the property in the Court of Bankruptcy.

We do not concur in this view of the question.

The plaintiff, when this action was commenced, had, according to the allegations of the complaint, a complete and perfect right of action against the defendant, for taking and carrying away his goods. The fact that the defendant seized the goods as the property of William Sutherland under process against the latter, cannot change the aspect of the question. If the property belonged to the plaintiff as alleged in the complaint, the defendant can no more justify the trespass than if he had seized the property without color of authority.

As has been said, at the time the action was commenced the plaintiff had a complete and perfect right of action against the defendant; and he had a right to prosecute it in the court where he commenced it.

At that time too, it may be observed, though it is perhaps immaterial, the defendant had still the possession of the property.

Subsequently, however, under an order of the Court of Bankruptcy, the defendant delivered the property to the assignee of William Sutherland, a bankrupt. This was done under proceedings in bankruptcy to which the plaintiff was in no way a party. We are unable to see how this fact can have the effect of abating the plaintiff's action, or of compelling him to lose the property or pursue it into the Court of Bankruptcy. We think he had a right to prosecute his action to final judgment in the court where he commenced it. The case is, in principle, much like that of *Peck* v. *Jenness*, 7 How. 112. There Jenness, Gage & Co., brought an action against Peck & Bellows, in one of the New Hampshire state courts, and issued an attachment by which they acquired a lien on property attached, and a right to make their debt out of it. Pending the action Peck & Bellows became bankrupt, and one Howland was appointed their assignee, who appeared to the action, pleaded the bankruptcy, and alleged an order of the Bankruptcy Court for the delivery of the attached property by the sheriff to him. But the court, notwithstanding this order of the Bankruptcy Court, gave judgment for the plaintiffs, to be levied of the property attached. This judgment was affirmed by the Superior Court of Judicature of New Hampshire, whose decision was affirmed by the Supreme Court of the United States.

Counsel for the appellant has called our attention to the case of *Markson* v. *Haney*, 47 Ind. 31. But that case is not in point here. That case decides, in substance, that where a District Court of the United States has first acquired jurisdiction over a bankrupt, that jurisdiction is plenary and exclusive over the property of the bankrupt, so long as the proceedings in bankruptcy are pending. To make that case applicable we should be compelled to assume the very point in dispute, that is, that the property attached was the property of the bankrupt. The plaintiff, in his complaint, alleges that the property was his, and he had a right to have that question tried in the court where he brought his action.

The order for the delivery of the goods by the defendant to the assignee, as exhibited in the answer, is as follows:—

"Comes now W. A. Bradshaw, assignee herein, and files his petition duly verified, setting forth that of the assets of said estate is a certain stock of goods, wares and merchandise, of the value of $3000, which were seized under attachment against the bankrupt about the 7th of May 1870, by the sheriff of Cass county, in said district, and are now in boxes at Logansport in said county, and suffering loss in its present state; that one George C. Sutherland, a son of the bankrupt, makes claim to said goods by virtue of a pretended conveyance from his father of April 28th 1870, and he prays that said goods be removed to Indianapolis and sold, and the fund held instead of the goods, to answer such claim as the said George may establish; and it is thereupon ordered that said assignee do remove said goods to the city of Indianapolis forthwith, and sell the same promptly at auction for cash, discharged of liens, holding the proceeds instead of the goods to answer to such claim as may be established against them, first giving notice of the time and place and terms of sale by advertising the same in the 'Daily Indianapolis Journal' and a paper of general circulation printed at Logansport aforesaid."

Section 5063 of the Bankrupt Act (R. S. U. S. 983) provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee and after such notice to claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale."

A construction was given to this section of the Bankrupt Act in the case of *Knight* v. *Cheney*, 5 Bank. Reg. 305. In that case the assignee of one Hunt claimed a stock of merchandise in the possession of a certain firm doing business in the city of Providence, who refused to deliver the same to the assignee, claiming

the goods by purchase from the bankrupt, and the assignee filed his petition in the District Court, praying that a citation might issue against the firm, and to the members composing it, requiring them to show cause why the sale and transfer of the property should not be adjudged void. The parties respondent to the proceeding moved to dismiss the petition of the assignee, but the motion was overruled and they were required to answer the allegations of the petition.

On revising this decision in the Circuit Court, the judgment of the District Court was reversed. Judge CLIFFORD, in delivering the opinion of the court, said: "Perishable estate of the debtor may be sold by order of the District Court under the direction of the messenger or assignee, the fund received to be held in place of the estate sold, and the provision is made in case the estate of the debtor is liable to deterioration in value. Corresponding provision is also made in respect to the estate of the debtor which has come into the possession of the assignee, *or which is claimed by him*, where it appears to the satisfaction of the court that the title to the same is in dispute, and the enactment is that "the court may, upon the petition of the assignee," after reasonable notice to the claimant, his agent or attorney, "order it to be sold under the direction of the assignee, the funds to be held in place of the estate," as in the case of the sale of perishable property.

"Discretionary power, it must be conceded, exists in the District Court to order a sale of the estate of the debtor, where it appears that his title is in dispute, if it also appears that the debtor was in possession of the estate at the time he was adjudged bankrupt, and that the estate was duly transferred to the assignee, and that it remained in his possession at the time the sale was ordered. Grant that the power of sale under that section extends to such a case as that supposed, still the concession does not sustain the decision of the District Court under revision, as the estate in this case was never transferred to the assignee, and was not in his possession at the time the order of sale was passed. On the contrary, it was in the actual possession of the respondent firm, claiming absolute title to and dominion over the same as their own property. Responsive to that suggestion, the proposition of the assignee is that the estate in question is claimed by him as such assignee, and that the power of sale extends to any portion of an estate to which the

title is in dispute where the same is claimed by the assignee, as in this case. Taken literally, the phrase "or which is claimed by him," would perhaps appear to afford some support to the theory of the assignee, but it is impossible to adopt that view, as it would authorize the district judge, in the settlement of the estate of the bankrupt, however small, to order the sale of the estate, if claimed by the assignee, of every inhabitant of his judicial district, and to direct the assignee to hold the funds received from the sales in place of the estates sold, and to compel the owners in possession of the same to appear in court and vindicate their titles, and to accept, if successful, the proceeds of the sale as the value of their property. Adopt that theory, and the constitution which was ordained to establish justice becomes a mockery, as any man may be deprived of his property without due process of law, and no man, where the title to property is concerned, is entitled to a trial by jury, unless he commences his action before the court orders the sale. Such a theory, as applied to the facts of this case, is not only repugnant to the constitution, but also to many other provisions of the Bankrupt Act, and especially to the third clause of the second section of the act, which contemplates that such controversies shall be prosecuted by an action at law, or a suit in equity, and gives concurrent jurisdiction to the Circuit and District Courts to hear and determine the same as provided in the Judiciary Act. * * * * * * * Viewed in any light, the court is of the opinion that the District Court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner."

Whether or not the defendant's alleged wrongful seizure of the goods under the attachment was such a deprivation of the plaintiff's possession as would, under the decision we have so largely quoted from, authorize the order of sale, we need not determine.

It is very clear that under the section of the Bankrupt Law set out, the claimant of the property is entitled to notice of any intended application for such order, by the assignee. The case of *Knight* v. *Cheney*, *supra*, assumes that such notice is necessary.

See also *Markson* v. *Haney*, 1 Dillon 497, 510. The order of sale in this case does not purport to have been made upon notice to the plaintiff, though it recites that he claims the property. If a notice might be presumed, still it might be controverted; and the reply does controvert it, for it alleges that the plaintiff was no party to the proceedings and had no notice of them. If the answer might possibly be held good, as setting up this order of sale, the reply is good, for it shows that the order was a nullity so far as the plaintiff was concerned, for the want of notice to him.

We pass now to the questions arising on the motion for a new trial. We make these extracts from the brief of counsel for the appellant, as containing a statement of the positions assumed by them.

"The 9th, 10th and 11th causes for a new trial involve the same questions and may be considered together. The 9th cause relates to evidence and the 10th and 11th causes to the instructions asked by the plaintiff and given by the court, and the instructions asked by the defendant and refused by the court. Concerning the evidence objected to, the court, over the objection of the defendant, allowed the plaintiff to prove by several witnesses the general signification of the word 'insolvency,' as understood among business men in the city of Logansport. Can there be any doubt that this was an error? Is the word 'insolvency,' as used in the Bankrupt Act of 1867, a legal term to be construed by the courts, or does it depend for its signification upon the varied opinions of men of different localities? Has it one meaning in one place and another meaning in another place? Are traders in New York, Cincinnati and Indianapolis, selling merchandise to a trader in Logansport, to be affected by the local signification of the word at Logansport? We think not. The word used in the act is for the courts to construe. There can be but one construction as applied to any kind of business, no matter where carried on.

"The 7th instruction asked for by the defendant was the law (*Loop* v. *Martin*, 13 Wall. 40; *Buchannan* v. *Smith*, 16 Id. 278), and ought to have been given. The 7th, 9th, 10th, 11th and 12th instructions asked for by the plaintiff and given by the court, were clearly in conflict with those decisions and ought not to have been given. We desire to call special attention to the 11th instruction of the plaintiff. In substance the jury are instructed that although George knew his father was embarrassed, yet supposed he had suf-

ficient property to pay his debts, he would not have reasonable cause to believe him insolvent. This instruction is squarely in conflict with the decisions of the Supreme Court (U. S.). Tested by those decisions the condition in which the instruction assumes George knew his father to be, made him insolvent within the meaning of the Bankrupt Law. This made George liable to its provisions and invalidated his title to this property."

It is thus seen that the objections so far made to the proceedings below are based upon the theory that the action was governed by the Bankrupt Law; in other words, that if the sale of the goods by William Sutherland to the plaintiff was in violation of the Bankrupt Law, the sale was void, and the plaintiff could not recover. We are of a different opinion. We think the Bankrupt Law had nothing to do with the question in issue. The assignee of the bankrupt was not a party to the proceeding, nor was any one before the court who was entitled to question the validity of the transfer under the Bankrupt Law. Even an assignee could not go into a state court to set aside a conveyance made by the bankrupt in violation of the Bankrupt Act: *Markson* v. *Haney*, 47 Ind. 31–37, and authorities there cited. A sale of goods may be made in violation of the Bankrupt Law, and yet be entirely good under the law of the state. The defendant in this action was not in a condition that authorized him to question the validity of the sale under the Bankrupt Law. The controversy here is substantially between the plaintiff and the attaching creditors of William Sutherland. If the property was transferred by William Sutherland to the plaintiff in violation of the Bankrupt Law, that furnished no ground on which any part of the creditors of William Sutherland could attach it; on the contrary, it was a conclusive reason why they should not. Such attachment would defeat the end of the Bankrupt Law, which is the distribution of the assets among all the creditors, while the attachment would secure the assets to the attaching creditors and such others as might file their claims under it.

If property can be attached by creditors in a state court, because it has been transferred by the debtor in violation of the Bankrupt Law, then the Bankrupt Law may be administered in a state court under the form of proceedings in attachment.

If the creditors of William desired to avail themselves of any act of bankruptcy committed by him, they had a remedy by pro-