sons were acting have arisen in connection with the question of *de facto* officers. While the principal case has met with much unfavorable criticism, it would seem that some of it at least arises from the employment of the term "*de facto*" in the sense there used, rather than from any well-grounded belief that the decision is not in accordance with principle. The term "*de facto*" is recognised as having a certain meaning and use in connection with persons holding and exercising the functions of an office without having a strict legal right thereto; but its use as applied to political organizations is not frequent, and indeed, by some very eminent law writers, its right to be so used seems to be denied.

In *Williams* v. *Bruffy*, 6 Otto 176, the Supreme Court of the United States speaks of *de facto* governments, and instances the circumstances under which they may be said to exist, and when their acts will be recognised as the acts of a *de facto* power. Such a *status*, however, was not conceded to the confederate states, although the legislative acts of the several states in rebellion were held to be of binding force where they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the constitution.

If, as stated in this case, there may exist *de facto* governments, there would seem to be no good reason why the term may not be applied to a court, under circumstances as shown in the principal case.

The objection that a *de facto* officer presupposes a *de jure* office, seems at first thought to have much force in the discussion of this question, but considered in the light of the two cardinal doctrines of the *de facto* law—possession under color of right; and the public necessity of holding valid the acts of those who have been reputed and acknowledged by the public as having rightful authority—it would seem to be a long distance from being a controlling canon of law in such cases.

HOMER C. IRISH.

Minneapolis.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF KANSAS.[1]
COURT OF ERRORS AND APPEALS OF MARYLAND.[2]
SUPREME JUDICIAL COURT OF MASSACHUSETTS.[3]
COURT OF CHANCERY OF NEW JERSEY.[4]
SUPREME COURT OF VERMONT.[5]

ACTION. See *Surety*.

Promise to pay Debt of Promisee to Third Person.—A promise by A. to B., who has assigned certain goods to A., to pay the amount owed by

[1] From A. M. F. Randolph, Esq., Reporter, to appear in 32 Kansas Reports.
[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 61 Md. Rep.
[3] From John Lathrop, Esq., Reporter; to appear in 136 Mass. Rep.
[4] From Hon. John H. Stewart, Reporter; to appear in 38 N. J. Eq. Rep.
[5] From Edwin T. Palmer, Esq., Reporter; to appear in 56 Vt. Rep.

B. to his employees for labor on the goods, will not render A. liable to an action of contract by one of such employees: *Morrill* v. *Lane*, 136 Mass.

Injury to Chattel in Bailee's Possession—Suit by Bailee.—If a chattel, while in the possession of a bailee for hire, is injured by the negligence of a third person, and is repaired by the bailor, and the cost of the repairs is charged to the bailee, at his request, the latter, although he has not paid such cost, may maintain an action of tort against the person causing the damage: *Brewster* v. *Warner*, 136 Mass.

ASSUMPSIT. See *Action.*

Overpayment—Mistake—Practice.—In an action of general assumpsit to recover money overpaid on settlement, it was proved that the defendant had money in his hands that in good conscience belonged to the plaintiff. *Held*, that the plaintiff was entitled to recover, although the special ground upon which he claimed to establish the overpayment failed: *Bates* v. *Quinn*, 56 Vt.

BAILMENT. See *Action.*

BILLS AND NOTES.

Draft authorized by Telegram—Authority revoked by Telegram—Liability of Drawee as Acceptor.—Where a telegram is sent authorizing a draft to be drawn, and another telegram is afterward sent countermanding the authority previously given, and on the faith of the first telegram, which only was exhibited to the cashier of the bank, a draft was discounted by the bank, the drawee cannot be held liable as acceptor: *First Nat. Bank of Flora* v. *Clark*, 61 Md.

The drawee of a draft will not be held liable for a breach of promise in not accepting, unless there was a promise to accept it at the time the draft was drawn: *Id.*

COMMON CARRIER.

Loss of Baggage—Articles not properly falling within that Description.—Where the duly authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage: *Chicago, Rock Island and Pacific Railroad Co.* v. *Conklin*, 32 Kans.

Where personal property is received by a railroad company to be transported as baggage, and while it is in the possession of the railroad company, to be transported, it is lost or stolen; *Held*, that the railroad company is responsible to the owner for its loss: *Id.*

CONSTITUTIONAL LAW.

Eminent Domain—Use of Highway by Telegraph Company.—The transmission of intelligence by electricity is a business of a public character, and the legislature may grant to a telegraph company the exercise of the right of eminent domain: *Pierce* v. *Drew*, 136 Mass.

An additional servitude is not imposed by the appropriation of a public highway, under the Pub. Sts. c. 109, for the use of a line of

electric telegraph, by the erection of poles and wires above the surface of the ground; and the statute is constitutional, although it makes no provision for compensation to the owner of the fee in the highway: *Id.*

Arrest—Complaint verified on Hearsay and Belief.—It is declared by sect. 15 of the bill of rights in the constitution of the state of Kansas that no warrant shall be issued to seize any person, but on probable cause supported by oath or affirmation; therefore a complaint or information filed in the District Court charging a defendant with a misdemeanor and verified on nothing but hearsay and belief is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination and no waiver of the right to such examination has been had: *State* v. *Gleason*, 32 Kans.

Impairing Contract—County Office not a Contract.—A county office is not a contract and the incumbent is not protected in it by the prohibition of the federal constitution against the impairment of the obligation of contracts. He has no such vested interest in the salary as will prevent the legislature from diminishing it during his term of office: *Harvey* v. *The Board of County Commissioners*, 32 Kans.

Where a law is enacted diminishing the salary of a county officer during his official term and such diminution applies after the law takes effect, the law is prospective and not retroactive: *Id.*

Impairing Contract—Law changing place of Payment of Negotiable Paper.—Any law that attempts arbitrarily to change the place of payment of negotiable paper, after its sale and transfer, cannot be upheld, as the place of payment is a part of the contract, and a law which changes the terms of a contract impairs the same: *Dillingham* v. *Hook*, 32 Kans.

Where the bonds of a county of the state of Kansas are payable upon their face at a particular bank in the city of New York, and such bonds were executed and delivered prior to the passage of the act entitled, "An act to provide for the establishment of a fiscal agency for the state of Kansas in the city of New York, and prescribing the duties of officers in relation thereto," approved March 6th 1874, said act cannot change the place of payment of the bonds of the county; and its provisions requiring the treasurer of the county by which the bonds were executed, to remit to the fiscal agency of the state—being a different place than where the bonds are payable—sufficient moneys for the payment of the bonds at the agency, is unconstitutional and void: *Id.*

CRIMINAL LAW. See *Constitutional Law.*

Mental Unsoundness—Burden of Proof.—Where a person at the time of the comission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars. But if he does not possess this degree of capacity, then he is not so responsible: *State* v. *Nixon*, 32 Kans.

In a criminal prosecution, where the jury entertain a reasonable doubt as to whether the defendant is sane or insane with respect to the particular acts charged against him, they should acquit; and *held*, that the court below charged the jury in substance to this effect: *Id.*

Debtor and Creditor.

Voluntary Conveyance by Party Indebted at the time—Presumption of Fraud—Burden of Proof—Hindrance to Creditors.—The motive or purpose with which a voluntary transfer of property is made, by a party indebted at the time, is not material. Such a conveyance, irrespective of the actual intent of the debtor, is *prima facie* in fraud of creditors: *Goodman* v. *Wineland*, 61 Md.

The presumption of fraud may be repelled by proving, that the grantor, at the time of the gift, was possessed of other means, amply sufficient to pay his debts; and the *onus* of so proving is upon those seeking to uphold the gift: *Id.*

It is a *hindrance* to creditors for a debtor to dispose of his real property and tangible chattels, which are readily subjected to execution, and compel them to rely upon merely personal obligations, with the risks and the necessity for numerous attachments usually incident to such a resource: *Id.*

Deed.

Execution in Blank—Innocent Purchaser.—Where C. in good faith purchases land from S. and afterward S. delivers to C. a deed of conveyance for the land completely executed by V., who is in fact the owner of the land, and C. in good faith accepts the deed, having no notice that the deed had been originally executed to a blank grantee, and having no notice of any agreement between S. and V. which might limit the effect of the deed, and S. is not the agent of either C. or V., but acts for himself, and no question is at any time raised with regard to the validity of the deed as a conveyance of the land; and V. delivers the possession of the land to C. without questioning C.'s title thereto or anything thereon, but afterward V. claims that he is entitled to the crops growing on the land by virtue of a parol agreement with S., *Held*, That the deed will not only convey to C. the land, but it will also convey to him all the crops growing thereon, although it may be that V. when he executed the deed believed that he was executing the same to S., and although in fact he executed the deed to a blank grantee, and that S. afterward filled up the blank by inserting the name of C., and although there may have been a parol agreement between V. and S. that the crops growing on the land should continue to be the property of V.: *Chapman* v. *Veach*, 32 Kas.

Easement.

Substitution of Sewer for Natural Stream—Obstruction of Sewer.—Defendants, thirty years ago, changed the course of a natural stream of water that ran through defendants' land and drained complainants' lands, and substituted therefor a sewer, presumably by consent of the owner of complainants' lands. They have obstructed the sewer and recently built an embankment near the complainants' line so as to back the water on complainants' said lands. *Held*, That this court would compel them

to remove the embankment, and either restore the natural stream to its original course or to remove the obstructions from the sewer and rebuild it, although there is an allegation that if either be done the water will be discharged on the lands of other persons, and also that the defendants are pecuniarily unable to do either: *Oliver* v. *N. Y. Bay Cemetery Co.*, 38 N. J. Eq.

Errors and Appeals.

Bill of Exceptions not conclusive as Evidence on a Retrial—Admissions by Counsel—Estoppel—Practice.—When a cause has been remanded from the Supreme Court for a new trial the bill of exceptions is not conclusive as a statement of facts on a retrial; nor is a party estopped by oral admissions made by his counsel during the former trial, the admissions having been embodied into the exceptions; but he may show what limitations were made to the concessions, what transpired, out of which the exceptions arose; thus, in an action upon a policy of insurance, which covered the plaintiff's furniture, the exceptions showed that the plaintiff conceded certain facts on the former trial from which it was evident that he had given false answers in the application, as to the occupancy of the lower story of the building in which his furniture was kept, and as to the ownership of a store of goods in the same building, and on a retrial the plaintiff offered to prove that the answers, though false, were made without his knowledge by the defendant's own agent, "written in afterwards," * * * the "agent using his own terms," and that the admissions were oral, made by his attorneys on the former trial, and for that trial only. The court, treating the exceptions as a part of the record, ordered a verdict for the defendant. *Held*, error; and that the plaintiff's evidence should have been submitted to the jury: *Mullin* v. *Vt. Mutual Fire Ins. Co.*, 56 Vt.

Evidence.

Incompetent Witness—Failure to Object to Testimony—Power of Court.—If a party against whom an incompetent witness is called, with full knowledge of his incompetency, allows the witness to be sworn and examined, without objection, he will be considered to have waived the objection to his competency: *Monfort* v. *Rowland*, 38 N. J. Eq.

Though the party against whom an incompetent witness has given evidence may have lost his right to object to his evidence, yet the court may, on its own motion, if it appears that the evidence is opposed to the policy of the law and dangerous to the administration of justice, suppress it; *Id.*

Executors.

Devise in Trust—Power to Sell.—Where property is given to executors in trust, to be equally divided among testator's children, with a direction to pay the sons their shares, and to hold the daughters' shares, and pay them the income thereof, in half-yearly payments for life, the executors have power to sell the testator's lands: *Belcher* v. *Belcher*, 38 N. J. Eq.

Fraud.

Order on Employer to pay Wages—Subsequent Collection—Tort.—The defendant, a quarryman, gave an order on O. & Co., his employers,

to pay his monthly wages to the plaintiff, for his, defendant's monthly store bill, and to pay an old debt due the plaintiff. Notice was given to O. & Co. of the order. They refused to accept it, but did, however, pay the wages to the plaintiff for several months, then notified him that they would do so no longer, and paid directly to the defendant. O. & Co. alone were responsible for the discontinuance of the payments to the plaintiff. *Held*, that the receiving of his wages by the defendant, although he was then indebted to the plaintiff, did not amount to a tort: and that an action brought upon the theory that the defendant was liable as for a tort could not be maintained, as the element of fraud was lacking: *McGuire* v. *Kiveland*, 56 Vt.

Troy v. *Aiken*, 46 Vt. 55, distinguished: *Id.*

HIGHWAY. See *Municipal Corporation.*

HUSBAND AND WIFE.

Personal Injuries to Wife—Joinder of Counts for Injuries and Expenses of Cure.—Action was brought on the 8th of April, 1882, by A. W. M. and M. his wife, against a railroad company, to recover damages for personal injuries sustained by the wife. The declaration contained but one count, in which, after detailing the injuries sustained by the wife, it was alleged, "and also thereby the said *plaintiffs* were forced and obliged to, and did pay, lay out and expend a large sum of money in and about endeavoring to cure the said M. of the bruises," &c., "occasioned as aforesaid." After verdict for the plaintiffs, a motion in arrest of judgment was made on the ground that the declaration included a cause of action for which the husband should sue alone. The motion was overruled. On appeal it was *Held*, That it was error to include in the claim of damages money expended to effect the wife's cure, the right of action for money thus expended, being in the husband alone: *The Northern Central Railway Co.* v. *Mills*, 61 Md.

Married Woman—Capacity to Execute Power—Joinder of Husband.—A married woman may execute any kind of power, whether simply collateral, appendant, or in gross; and it is immaterial whether it was given to her while sole or married. In neither case is the concurrence of her husband necessary: *Armstrong* v. *Kerns*, 61 Md.

INSURANCE.

Condition against Sale—Sale by one Partner to the other.—A. sale by one partner to his copartner, and a mortgage back of the seller's share of the partnership property, upon which there is a policy of insurance against loss by fire, issued to the partnership, are not a breach of a condition in the policy that it shall be void, if, without the written assent of the insurer, "the said property shall be sold." *Powers* v. *Guardian Fire and Life Insurance Co.*, 136 Mass.

A policy of insurance against loss by fire, issued to a partnership upon its property, contained the condition that the policy should be void, if, without the written assent of the insurer, "the situation or circumstances affecting the risk shall, by or with the advice, agency or consent of the insured, be so altered as to cause an increase of such risk." One partner sold to his copartner, and took back a mortgage of the seller's share of the partnership property. *Held*, in an action on the policy, in which

both partners joined, that it could not be said, as matter of law, after a finding for the plaintiffs, that there was a breach of the condition: *Id.*

Mutual Company—By-Laws providing for Reinstatement after Default—Refusal to Reinstate.—The by-laws of an unincorporated mutual insurance association provided that in case a member had, for failure to pay an assessment promptly, been dropped from the association by the secretary the board of directors should have power to reinstate him on his presenting to them a reasonable excuse for such failure and paying the sum in arrear. A member being delinquent appeared before them and offered a sufficient reason for his delinquency, and the board refused to reinstate him, because they alleged that his health was then precarious. He died very soon afterwards. *Held*, that this court might, after his death, examine into and determine the adequacy of the reason so offered, and, in a proper case, compel the association to pay the amount of insurance to which such delinquent's widow was entitled: *Van Houten* v. *Pine*, 38 N. J. Eq.

Judicial Sale.

Rights of Purchaser—Impeachment of Decree.—A purchaser at a judicial sale runs no risk in respect to the correctness of the legal principles on which the judgment under which he purchases is founded: *Shultz* v. *Sanders*, 38 N. J. Eq.

A reversal of the judgment under which a sale has been made, subsequent to the passage of title, will not nullify or disturb the purchaser's title: *Id.*

A purchaser at a judicial sale cannot be heard, on an application to be discharged from his contract, to impeach the decree under which he purchased: *Id.*

Legacy.

Interest.—Where a legacy is given to one not a child of the testator, nor one to whom testator stood *in loco parentis*, payable "at the age of twenty-one years," the legatee is not entitled to interest thereon except from the time when the legacy is payable: *Weatherly* v. *Kier*, 38 N. J. Eq.

Libel.

Privileged Communication.—If a person, who has been accused by his employer of stealing money from him, informs a friend of the accusation and seeks his advice, and the latter has an interview with the employer, in which he informs him of the grounds of the charge, and during which the accused person comes in and begins a conversation with his employer, referring to the charge of larceny, whereupon the employer repeats the accusation, the third person still being present, the occasion renders the words privileged: *Billings* v. *Fairbanks*, 136 Mass.

Limitations, Statute of.

Acknowledgment of Debt—Conditional Promise.—A debtor while in bankruptcy wrote to his creditor as follows: "I shall pay you all I owe you with interest, but at this time I cannot. As soon as I can, I shall pay you. When I can, I shall pay up all my debts, and yours shall be

the second that I pay. To pay you now, I cannot spare a dollar from my business, but if you will wait, I think I can pay you some time." *Held*, that these statements amounted only to a conditional promise to pay when the debtor should be able; and, in the absence of evidence of his ability to pay, would not, under the Pub. Sts. c. 78, § 3, deprive the debtor of relying upon a discharge in bankruptcy, in bar of the recovery of a judgment upon the debt: *Elwell* v. *Cumner*, 136 Mass.

A debtor while in bankruptcy wrote to his creditor as follows: "My lawyer says I must not pay any one a dollar until I get through bankruptcy, then I can pay if I want to do so. I shall pay you all and the interest, but you will have to give me time. This is all I can say now." *Held*, that this was not such evidence of a new or continuing contract, within the Pub. Sts. c. 78, § 3, as would deprive the debtor of relying upon a discharge in bankruptcy, in bar of the recovery of a judgment upon the debt: *Id.*

When it commences to Run.—The defendant without leave took the plaintiff's iron; in the following year he promised to pay for it. *Held*, that the Statute of Limitations commenced to run at the time of the promise: *Farnham* v. *Thomas*, 56 Vt.

Master and Servant.

Injury by Defective Machinery—Knowledge of Defect.—The fact that a brakeman in the employ of a railroad corporation knew, or might have ascertained, that the draw-bars of a locomotive engine and of a car, to which it was to be coupled by him while standing upon a plank in front of the engine, were of unequal height, so that they would be likely to pass each other instead of coupling together, though furnishing strong evidence of carelessness on his part, will not, as matter of law, preclude him from maintaining an action against the corporation for injuries occasioned by reason of the draw-bars so passing each other, that of the engine being too low for the purpose for which it was used: *Lawless* v. *Conn. River R. R. Co.*, 136 Mass.

Municipal Corporation. See *Practice; Taxation.*

Negligence—Highway by Adoption—What Evidence Necessary—Admissions of Selectmen.—The use of a road for public travel, however extensive that use may be, is not sufficient to constitute such road a highway by adoption so as to impose the duty upon the town to keep it in repair. There must be in addition evidence of some act of the town recognising it as a highway—as putting the same in the rate bills of the highway surveyor, expending money, thereon, shutting up the old road, leaving no other avenue for travel, etc.; hence, the plaintiff failed to prove that the highway upon which the accident happened was one that the town was legally bound to keep in repair, by proving that the road was used, that it was the direct thoroughfare from one street to another, that there were side-walks upon both sides of it, and a lamp post on one corner; and, although the defendant did not object to the admission of this evidence, it did not thereby waive its right to claim legal proof that it was bound to keep the highway in repair: *Tower* v. *The Town of Rutland*, 56 Vt.

The plaintiff claimed that her horse became frightened at a dump-

him and which in the absence of any stipulation forbidding it, B. could sell or mortgage. *Held, further,* that on the last payment the title to the personalty vested in B., whose mortgage became valid, and took precedence of A.'s attachment: *Carpenter* v. *Scott*, 13 R. I.

Williams v. *Briggs*, 11 R. I., 476, and *Cook* v. *Corthell*, *Id.* 482, explained and distinguished: *Id.*

Sheriff's Sale.

Rescission—When Creditor Estopped—Offer to Restore.—Where a creditor participates in the distribution of the proceeds of property sold under execution, he ratifies the same and is estopped from subsequently attacking it: *Adams* v. *Moulton*, 1 McGloin.

Such a participation, however, if made in error of fact, might, upon proper allegations, be rescinded: *Id.*

Such rescission could only be decreed in a suit for that purpose, to which all who participated in the proceeds are made party: *Id.*

A person asking for the rescission of a contract, &c., must, as a prerequisite to his suit, return or tender what he has received from the transaction complained of, and otherwise restore, so far as possible to him, the condition of things as they stood before the contract, &c., that he attacks: *Id.*

Shipping.

United States Commissioners' Fees—Reshipment of Sailors.—The provision of sect. 4513, Revised Statutes, that the fee of $2 required to be paid to the shipping commissioner for each seaman shipped, under sects. 4511 and 4512, shall not be exacted, where, on the return of the vessel, the sailor reships in the same vessel for another voyage, applies to reshipments for all voyages succeeding the first in regular order, and is not limited to the reshipment for the one voyage immediately following the one at which the fees were paid: *Young* v. *American Steamship Co.*, S. C. U. S., Oct. Term 1881.

Statute. See *Exemption.*

Taxation. See *Constitutional Law*

Telegraph. See *Constitutional Law.*

Trial.

Time of Introduction of Evidence.—A court may, in its discretion, allow the introduction of evidence after the arguments of counsel have been concluded: *Darland* v. *Rosencrans*, 56 Iowa.

Trover.

Conditional Sale—Right of Vendor.—If a chattel is sold and delivered upon condition that it shall be paid for on a certain day, and shall remain the property of the seller until paid for, the seller has not such possession or right to immediate possession as will support an action of tort in the nature of trover, against an officer who has attached the chattel as the property of the purchaser, brought before the day named for payment: *Newhall* v. *Kingsbury*, 131 Mass.

co-partner by signing an instrument under seal in the firm name and style, simply by virtue of his authority as partner. To make such instrument binding on the partner not signing in person, it must appear that he previously authorized the act or subsequently ratified it, either expressly or impliedly. And such previous authority or subsequent confirmation may be shown by parol or by circumstances: *Herzog* v. *Sawyer*, 61 Md.

PLEADING.

Slander—Inconsistent Defences.—In an action for slander the defendant may set up the defences: First, that he did not use the language imputed to him; and second, that such language is true. The two defences are not inconsistent with each other and both may be true: *Cole* v. *Woodson*, 32 Kans.

POWER. See *Husband and Wife.*

PRACTICE.

Township failing to Elect Officer—Service by Publication in Suit against.—Although a township in the state fails, neglects and refuses to elect or permit or allow its trustee, clerk or treasurer to qualify or to designate some person upon whom service of summons or other legal process directed against it can be made, it cannot be brought into court upon service by publication, as it does not thereby, within the terms of the statute, conceal itself: *Rockway* v. *Oswego Township*, 32 Kans.

RAILROAD. See *Common Carrier; Negligence.*

SALE.

Rescission of—Insolvency of the Buyer—Assignment for benefit of Creditors—Delivery and Acceptance.—The insolvency of the buyer does not in itself revoke an agreement for the purchase of goods made prior to the insolvency. If the property in such case is delivered, the title vests in the assignee. The seller may stop the goods *in transitu*, but if he does not, the title passes on delivery: *McElroy* v. *Seery*, 61 Md.

The same principle applies to the case of a voluntary assignment for the benefit of creditors: *Id.*

TAXATION.

Municipal Improvement—Ordinance—Opening Street—Public Benefit—Presumption.—If an ordinance providing for the opening or improving a street, declares in terms that the improvement is for the *general public benefit or convenience*, without anything more, it will be presumed that the ordinance was enacted with an exclusive reference to the general public convenience, and with no reference whatever to local benefits to owners of adjoining property; and therefore the cost of the improvement should be borne exclusively from the public treasury. But if the ordinance be silent upon the subject of the interests or benefits to be subserved, the presumption will be made that it contemplated local benefits as well as the general public convenience: *Mayor, &c.*, v. *Hanson*, 61 Md.

TELEGRAPH. See *Constitutional Law.*