an attachment of property abroad; and an injunction was granted. Substantially the same thing was done in England: *Mackintosh* v. *Ogilvie*, 4 T. R. 103, note; s. c. 3 Swanst. 365, note. In Ohio, before the garnishee or attachment proceedings are determined abroad, the courts will restrain the creditor from further proceedings: *Snook* v. *Snetzer*, 25 Ohio St. 516; but not after their determination; *Baltimore, &c., Rd.* v. *May*, 25 Id. 347. See *Morgan* v. *Neville*, 74 Penn. St. 53. A like rule prevails in Maryland, so far as restraining the proceedings before judgment, but nothing is said of it after their determination: *Keyser* v. *Rice*, 47 Md. 203; s. c. 28 Am. Rep. 448; likewise in Iowa: *Hager* v. *Adams*, 30 N. W. Rep. 36; *Teager* v. *Lendsley*, 27 Id. 739; and in Kansas: *Zimmerman* v. *Franke*, 34 Kan. 650; see *Missouri Pacific Rd.* v. *Maltby*, 34 Id. 125.

The case of *Uppinghouse* v. *Mundel*, cited in the principal case, was where an Indiana creditor of an Indiana debtor transferred his claim, in violation of the statute, to a citizen of Kentucky, who garnished the debtor's wages. The action was brought against the creditor by the debtor for damages, because of the illegal transfer, and consequent deprivation of the debtor of his right of exemption. It was held that such an action would not lie.

W. W. THORNTON.

Crawfordsville, Ind.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

COURT OF ERRORS AND APPEALS OF MARYLAND.[2]

COURT OF APPEALS OF NEW YORK.[3]

SUPREME COURT OF NORTH CAROLINA.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

SUPREME COURT OF THE UNITED STATES.[6]

ADMIRALTY.

Jurisdiction.—A District Court of the United States in Admiralty, has no jurisdiction of a petition by the owner of a steam vessel, for the trial of the question of his liability for damage caused to buildings on land, by fire alleged to have been negligently communicated to them by the vessel, through sparks proceeding from her smoke stack, and for the limitation of such liability, if existing, under sections 4283 and 4284, Rev. Stat.: *Ex parte Phœnix Ins. Co.*, 118 U. S.

ASSIGNMENT. See *Subscriptions.*

1 From Hon. N. L. Freeman, Reporter; to appear in 117 Ill. Rep.

2 From J. Shaaf Stockett, Esq., Reporter; to appear in 65 Md. Reports.

3 These cases will probably appear in 103 or 104 N. Y. Rep

4 From Theodore F. Davidson, Reporter; to appear in 95 or 96 N. C. Rep.

5 These cases will probably appear in 113 or 114 Penn. St. Rep.

6 From J. C. Bancroft Davis, Esq., Reporter; to appear in 118 U. S. Rep.

BANKS.

Assessments—Increase of Capital—Payment by Mistake.—In September, 1881, A. held thirty shares of stock in a national bank whose capital was $500,000, with a right to increase it to $1,000.000. In that month the directors voted to increase the capital to $1,000,000, the persons then holding stock to have the right to take new stock at par in equal amounts to that then held by them. A. then subscribed for thirty additional shares, paid for it three days later, and subsequently took out a certificate of stock for it. The amount of increased capital subscribed and paid for was $461,300, instead of $500,000, but A. had no knowledge of this deficiency until after the payment of said subscription, and of the assessment hereinafter referred to. On the 18th November 1881, the bank became insolvent, and an examiner was placed in charge of it by the comptroller of the currency. In December 1881, the directors cancelled the increase of stock above said sum of $461,300, and requested the comptroller to issue a certificate for the increase as so reduced, which he did. No vote of the stockholders was taken either on the increase or decrease. The comptroller then, under section 5205 Rev. Stat., called upon the bank for an assessment of 100 per centum on the holders of stock, to pay the deficiency in the capital stock. In January 1882, the annual meeting of the stockholders was held, at which it was voted to levy the assessment so called for, whereupon the comptroller permitted the directors to resume the control of the bank. A., being notified of this assessment, paid the amount assessed upon his sixty shares, upon being assured by one of the directors of the bank that there would be no other assessment. On the twentieth day of the following May the bank ceased to do business, and the directors thereupon voted to go into liquidation. The comptroller then appointed a receiver of the bank. In November 1882, the comptroller, under Rev. Stat., section 5151, made an assessment on the shareholders of 100 per cent. of the stock held by them respectively. A. declining to pay, the receiver brought an action at law against him to recover that amount on the sixty shares standing in his name. A. thereupon filed a bill in equity to restrain the prosecution of the action. *Held*, 1. That the increase of the capital stock of the company to $961,300 was valid. 2. That this increase was binding on A. to the extent to which he paid for and received certificates of increased stock. 3. That the payments made in January 1882, could not be applied, either at law or in equity, to the discharge of the assessments made by the comptroller in the final liquidation of the bank. 4. That the payment was not made by A. under a mistake against which equity can relieve him: *Delano* v. *Butler*, 118 U. S.

Liability of Stockholders.—Equity Jurisdiction.—Individual Liability.—Where the charter of a banking corporation makes its stockholders individually liable to the amount of the stock held by them, respectively, to depositors and other creditors of the bank, for any losses they may sustain, such liability is a common fund for the security of creditors, and a court of equity, aside from the ground of discovery, will have jurisdiction of a bill by a creditor, for himself and others, to enforce such liability, and control the fund thus raised for their benefit, and distribute the same ratably among them, the remedy at law in such case

being inadequate without the bringing of a multiplicity of suits. *Queenan* v. *Palmer*, 117 Ill.

A bank charter provided that the stockholders should "be responsible, in their individual property; in an amount equal to the amount of stock held by them, respectively, to make good losses to the depositors or others:" *Held*, that the individual liability was not in the nature of a penalty, and therefore enforceable only in a court of law, but was primary, and subject to the demands of depositors and other creditors, equally with the assets of the bank. *Id.*

A charter or statute making the stockholders of a corporation individually responsible in an amount equal to their stock, "to make good losses to depositors or others," will be construed to make the stockholders liable to all creditors who may suffer from the default or failure of the corporation to pay its indebtedness. The total or partial insolvency of the corporation, and its neglect to pay, is a loss to the creditor, in the sense of that word as used in the statute. Besides, the words, "to make good all losses," are equivalent to the words, "to make good all deposits," and mean, "to protect depositors against losses." *Id.*

Principal and Surety—Illegal Deposit with Bank of State Funds—Liability of Sureties of the Bank.—A., a state treasurer, deposited with B., a bank, a certain sum of the state funds; B. executing a bond, with C. and others as sureties, for the return of the money on demand. B. afterwards became insolvent, and A. brought suit against the sureties to recover the sum on deposit with B. *Held*, that he was entitled to recover. The bank having received the state's money, whether honestly or by fraud, the sureties were bound to make the loss good: *Harbison* v. *Bailey*, 113 or 114 Penn. St.

Transfer of Stock—Power of Attorney.—A., an owner of shares in the capital stock of a national bank, employed a broker and auctioneer to sell them by public auction. They were bid off by B., who paid the auctioneer for them, and received from him the certificate of stock, with a power of attorney for transfer duly executed in blank. The auctioneer paid the purchase-money to A. B. was employed by the president of the bank to make this purchase for a customer of the bank, who had made a deposit in the bank for the purpose, and he delivered the certificate and the power of attorney to the president, and received from the bank the money for the purchase. No formal transfer of the stock was made on the transfer-book of the bank. Shortly afterwards the bank became insolvent, and eventually went into the hands of a receiver, who made an assessment on the stockholders under the provisions of Rev. Stat., sect. 5205, to make up the deficiency in the capital. Until after the stoppage A. had no knowledge as to the purchaser, or as to the neglect to formally transfer the stock, and no reason to suppose that the transfer had not been made. In an action against A. by the receiver, to recover the amount of the assessment upon his said stock, *held*, that the responsibility of A. ceased upon the surrender of the certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as the president knew, a transfer of the stock on the books of the bank: *Whitney* v. *Butler*, 118 U. S.

Custom of Corresponding Banks as to Collections—Rights of Owner of Note.—A. deposited with B., a bank, for collection, a note, which he

endorsed in blank. B. sent it to its correspondent, C., endorsed: "Pay N., cashier, or order, for account of B." C. gave nothing for the note, and afterwards collected the amount of it. Prior to the collection B. became insolvent, and was indebted to C. in the sum of $7000, and C. applied the proceeds of the note to this indebtedness. *Held*, upon a suit by A. against C., that the usage or custom between B. and C. to apply the collections to overbalances could not prevail, and that C. was liable to A. for the amount of the note: *Hackett* v. *Reynolds*, 113 or 114 Penn. St.

CHATTEL MORTGAGE. See *Landlord and Tenant.*

COMMISSIONS. See *Will.*

CONSTITUTIONAL LAW.

Railroad—Unjust Discrimination—Construction of Statute.—A statute of Illinois enacts that, if any railroad company shall, within that state, charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination. The defendant in this case made such discrimination in regard to goods transported over the same road or roads, from Peoria, in Illinois, and from Gilman, in Illinois, to New York: charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to New York than the latter, this difference being in the length of the line within the state of Illinois. *Held*, 1. This court follows the Supreme Court of Illinois in holding that the statute of Illinois must be construed to include a transportation of goods under one contract and by one voyage from the interior of the state of Illinois to New York. 2. This court holds further that such a transportation is "commerce among the states," even as to that part of the voyage which lies within the state of Illinois, while it is not denied that there may be a transportation of goods which is begun and ended within its limits, and disconnected with any carriage outside of the state, which is *not* commerce among the states. 3. The latter is subject to regulation by the state, and the statute of Illinois is valid as applied to it. But the former is national in its character, and its regulation is confided to Congress exclusively, by that clause of the constitution which empowers it to regulate commerce among the states. 4. The cases of *Munn* v. *Illinois*, 94 U. S. 113, *Chicago, Burlington & Quincy Railroad* v. *Iowa*, Id. 155, and *Peik* v. *Chicago & Northwestern Railway*, Id. 164, examined in regard to this question, and held, in view of other cases decided near the same time, not to establish a contrary doctrine. 5. Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a statute of a state, intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one state to another, is not within that class of legislation which the states may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the state. 6. It follows that the statute of Illinois, as construed by the Supreme Court of the state, and as applied to the transaction under consideration, is forbidden by the Constitution of the United States, and the judgment of that court is reversed: *Wabash, &c., Railway* v. *Illinois*, 118 U. S. WAITE, C. J., BRADLEY and GRAY, JJ., dissent.

Oleomargarine—Prohibition of Manufacture of declared Constitutional as a Proper Exercise of the Police Power.—All doubts as to the constitutionality of an Act of Assembly should be resolved in favor of its validity: *Powell* v. *Commonwealth*, 113 or 114 Penn. St.

The Act of May 21st 1885, prohibiting the manufacture and sale of oleomargarine, and the keeping of the same with intent to sell, falls within the power of the general assembly to legislate for the public health: *Id.*

The fact that individuals and corporations may suffer loss from this prohibition can have no effect when the legislature has declared that public safety require such prohibition; and to declare the act unconstitutional because, in the judgment of some, the legislature may have mistaken the public necessity for a law, would be to make the individual judgment superior to that of the legislature: *Id.*

The fact that a prohibited substance, in a pure state, may be wholesome, is irrelevant in a judicial inquiry, and hence it was not error to refuse to admit evidence to show that the article sold in this particular case was pure and wholesome: *Id.*

The mere fact that experts may pronounce a manufactured article, intended for human food, to be wholesome and harmless, does not render it incompetent for the legislature to prohibit the manufacture and sale of such article: *Id.*

The test of the reasonableness of a police regulation, prohibiting the making and vending of a particular article of food, is not alone whether it is in part unwholesome and injurious; but if it is of such a character that few will eat it, knowing its real character; if it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and if there is probable ground for believing that entire prohibition of the article is the only way to prevent its fraudulent substitution for the real article in common use; then such a prohibition of its manufacture and sale may stand as a reasonable police regulation, although the article prohibited is, in fact, innocuous: *Id.* GORDON, J., dissents.

CORPORATION.

Stock owned by one Person.—Where one person becomes the sole owner of all the stock of a private corporation, he may renounce his rights under the act of incorporation, and may conduct the business as a private individual, without corporate formalities: *Swift* v. *Smith, Dixon & Co.*, 65 Md.

COSTS. See *Will.*

CREDITOR'S BILL. See *Subscription.*

CRIMINAL LAW.

Murder—Manslaughter—Furor Brevis.—Where the prisoner's evidence shows that, after a conflict with the deceased, which left him paralyzed and unresisting, the prisoner "let go" of him, and went after and obtained his axe, neglecting to use a knife which lay at hand on the ground, and ended his helpless opponent's life therewith, such action cannot be held to be unpremeditated, and prompted by the frenzy engendered in the struggle, to reduce the crime to manglaughter, but shows such premeditation and design to kill as will amount to murder: *People* v. *Beckwith*, 103 or 104 N. Y.

DAMAGES. See *Landlord and Tenant.*

Consequential— What recoverable as.—In a common law action, plaintiff can recover under Article XVI., section 8, of the constitution, for injury to his property, including noise, smoke, dirt, &c., which at common law are common annoyances, for which an action would not lie on behalf of an individual. He is not limited to such injuries as would have been actionable at common law, if the defendant had proceeded without legislative authority: *Pittsburgh, &c., Ry.* v. *McCutcheon*, 113 or 114 Penn. St.

The inconvenience arising from the increased difficulty of access to the property; the ordinary danger from accidental fires to the buildings, not resulting from negligence, and generally all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the property, are proper subjects for consideration. *Id.*

Damages are recoverable for injuries resulting from the operation of the road after its completion, not merely for those incident to its construction. *Id.*

DEED. See *Waters and Water-courses.*

DISCRIMINATION. See *Constitutional Law.*

EASEMENT.

When Appurtenant to Estate—Alley Way—Right of Purchaser—Proof of Owner's Intention.—Where the owner of two tenements, or of an entire estate, has so arranged and adapted them that one tenement or one portion of the estate derives a benefit and advantage from the other, of a permanent, open and visible character, and he sells a portion of the property, the purchaser will take the tenement or portion sold with all the benefits and burdens which so appear at the time of the sale to belong to it. It is not necessary in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor: *Cihak* v. *Klehr*, 117 Ill.

In this case, the agent of the owner of three lots (19, 20 and 21), lying parallel to each other and adjoining, for convenience in leasing, made a plat of lots 20 and 21, dividing them transversely into four lots, leaving an alley ten feet wide off the ends of such lots next to lot 19, which accommodated that lot as well as the other four of the subdivision, and was highly convenient and beneficial to lot 19. The agent in negotiating for the sale of the half of lot 19 next to the alley, exhibited to the purchaser a plat showing such alley, acknowledged by the lot owner, and promised to have the same recorded, and the sale was closed by the purchaser on the assurance and belief that such alley was an easement to his lot, and the owner, in making sales and conveyances of the other lots, sold with reference to such plat, and reserved off the end of each of the four lots ten feet next to lot 19, and finally put such plat on record, on which the alley was marked "reserved for private alley:" *Held*, that such alley became and was an easement appurtenant to lot 19, which could not be destroyed by the owners of the other lots without the concurrence of the purchaser of lot 19. In such case, the subsequent sale of lots by such plat, reserving the alley, implied knowledge

by the owner of the same, and was evidence tending to show his adoption and confirmation of the subdivision: *Id.*

Where it becomes material to show a party's intention in regard to the object and purpose of an alley between his lots, it is not competent to prove, by a witness, that the intention of the owner was to reserve the alley for lots on one side thereof only. It is not competent for a witness to testify to another's intention. All that is proper in such case, is, to testify to acts and declarations, as showing intention, when the question is, what others dealing with the property had reason to believe was the intention, from the circumstances, and acts done: *Id.*

EQUITY. See *Vendor and Purchaser.*

EXECUTOR. See *Will.*

INJUNCTION. See *Landlord and Tenant.*

INSURANCE. See *Tax.*

Lightning Clause—Live Stock—Mention in Policy of Building where Live Stock is contained, does not confine the Risk to that Place—General Conditions, when held Inapplicable to Particular Risk.—Where a horse or other live stock is described in a policy of insurance against fire, to which is attached a clause of indemnity against lightning, as "contained in" a certain building, such description is not a contract or warranty on the part of the insured that the horse will be kept all the time in that building, or that the insurance shall cease when the horse is away from that building. The insurance is recoverable where the horse is killed by lightning while pasturing in an adjoining field. *Haus* v. *Fire Association of Phila.*, 113 or 114 Penn. St.

The terms and conditions of a policy of insurance will be construed with reference to the particular species of property insured, so as to give effect to the intention which the parties may reasonably be presumed to have had in view when the contract was made. *Id.*

A lightning clause attached to a policy of fire insurance, "subject to the terms and conditions of the policy," refers only to such terms and conditions as are applicable to insurance against lightning. *Id.*

LANDLORD AND TENANT.

Lien Clause in a Lease—Chattel Mortgage.—Where, in a lien clause of a lease, a lessor agreed with the lessee, a retail merchant, that in default of paying the rent, or in case of seizure of his goods under legal process, the lien should be enforced against all the goods and personal property on the demised premises, in the same manner as if it were a chattel mortgage, and it was further stipulated that the lessee should remain in possession of the mortgaged goods, and might continue to deal with them in the prosecution of his business, the said lien clause, though valid between the parties, both as to property in existence and on the demised premises when the lease was executed, and as to that afterward acquired, is fraudulent on its face as to creditors, and therefore void as to an assignee of the lessee: *Reynolds* v. *Ellis*, 103 or 104 N. Y.

Lease of Foundry—Obligation to furnish Steam—Damages.—In a lease of a foundry, adjoining the lessor's rolling mill, in which the boilers were heated over the furnaces, together with the yard space, joint use

of pattern shop and engine room adjoining, in which were engine and machinery but no boiler, at a fixed rent and for a definite term, a covenant that the lessee "shall pay fifteen cents per hour for the steam furnished to his engine," does not, without more, impose upon the lessor an obligation to furnish steam to the lessee's engine. It is merely a covenant that if the lessor furnishes steam and the lessee uses it, the lessee shall pay for it at the rate of fifteen cents per hour: *Penn Iron Co.* v. *Dillon*, 113 or 114 Penn. St.

It would be otherwise, if furnishing steam were a necessary incident to a lease of the premises: *Id.*

The measure of damages for the breach of a particular covenant in a lease is not the value of the lease or any part of it, but the loss actually resulting from the breach: *Id.*

Perpetual Lease—Waste—Injunction.—Equity will restrain a tenant under a lease for perpetual renewal, from tearing down and removing a dwelling house from the demised premises, if it be made to appear that such removal would greatly impair and endanger the security for the rent reserved; but so long as the rent is not rendered insecure thereby, the right of the tenant to take down and build up, alter, remodel and reconstruct at his own pleasure, ought not to be interfered with: *Crowe* v. *Wilson*, 65 Md.

LIABILITY. See *Banks; Subscriptions.*

LIMITATIONS, STATUTE OF.

A new promise, to repel the bar of the Statute of Limitations must be clear, positive, and distinctly refer to the debt sued upon. It must be made to the party, his agent or attorney. A promise to a third party will not be recognised: *Hussey* v. *Kirkman*, 95 or 96 N. C.

An unqualified acknowledgment of a subsisting indebtedness, whether made to the plaintiff or his agent, or to a stranger, is sufficient in this state, to remove the bar of the Statute of Limitations: *Stewart* v. *Garrett and Maus*, 65 Md.

NOTES AND BILLS. See *Banks.*

NOTICE. See *Vendor and Purchaser.*

POWER OF ATTORNEY. See *Banks.*

PRINCIPAL AND SURETY. See *Banks.*

RAILROADS. See *Constitutional Law.*

RELEASE. See *Will.*

STOCK. See *Banks; Corporations; Subscriptions.*

SUBSRIPTIONS.

Unpaid Subscriptions—Assignment—Creditor's Bills—Liability of Original Subscribers and Transferrees.—A subscriber who recognises the existence of a corporation by paying for certain shares and transferring others, thereby affirms and recognises his contract, and is estopped from afterwards denying it: *Bell's Appeal*, 113 or 114 Penn. St.

An informal *ex parte* transfer of stock in writing with a private agree-

ment of the transferree, that the transferrer shall not be further liable on the stock, the transaction never appearing on the books of the company, does not relieve the transferrer of liability: *Id.*

Where a bill is filed by a creditor of a corporation to collect the unpaid subscriptions of stockholders, no decree can be made where there is no ascertainment of any actual, specific debts, no designation of creditors, no adjudication upon the claims of intervening creditors, no determination that the unpaid capital is needed for the payment of debts, nor how much of the capital remained unpaid, nor by whom it was owing. All these things are indispensable to the making of a correct and valid decree: *Id.*

The obligation upon the stockholders is not statutory, but equitable, arising out of the equitable principle that the capital stock of the corporation is a trust fund for the payment of its debts. Only so much of the unpaid capital as is necessary for the payment of the debts can be called, and that after all other assets are exhausted; it is manifest, therefore, that there must be an account taken of the debts, assets, and unpaid capital on which to base a decree for an assessment of the amount due by each stockholder: *Id.*

Transferrees of stock of corporations have been held not liable for unpaid amounts of the subscriptions upon calls made subsequent to the assignment to them in two classes of cases, viz.: (*a*) Those turning upon the construction of the peculiar provision of particular charters: and (*b*) Those arising in the construction of charters issued under the provisions of the General Railroad Act of 1849, and governed by section seventh of that act: *Id.*

But in the general run of cases the equitable principle that the capital is a trust fund for the payment of debts requires that the assignee who has come into privity with the company by the transfer to him of shares subject to unpaid calls, is liable to contribute his quota to the trust by making up the payments to the full par value of the stock: *Id.*

TAX.

Foreign Insurance Company—Tax on Premiums.—A Pennsylvania fire insurance corporation began doing business in New York in 1872, and continued it afterwards till 1882, receiving from year to year certificates of authority from the proper officer, under a statute of New York passed in 1853. Chapter 694 of the laws of New York, of 1865 as amended by c. 60 of the laws of 1875, provided that whenever the laws of any other state should require from a New York fire insurance company a greater license fee than the laws of New York should then require from the fire insurance companies of such other state, all such companies of such other state should pay in New York a license fee equal to that imposed by such other state on New York companies. In 1873, Pennsylvania passed a law requiring from every insurance company of another state, as a pre-requisite to a certificate of authority, a yearly tax of 3 per cent. on the premiums received by it in Pennsylvania during the preceding year. In 1882, the insurance officer of New York required the Pennsylvania corporation to pay, as a license fee, a tax of 3 per cent on the premiums received by it in New York in 1881. In a suit against such corporation, in a court of New York, to recover such tax, it was set up as a defence, that the tax was unlawful, because the

corporation was a "person" within the "jurisdiction" of New York, and "the equal protection of the laws" had been denied to it, in violation of a clause in the Fourteenth Amendment to the Constitution of the United States. On a writ of error to review the judgment of the highest court of New York, overruling such defence, *Held*, that such clause had no application, because, the defendant being a foreign corporation, was not within the jurisdiction of New York, until admitted by the state on a compliance with the condition of admission imposed, namely, the payment of the tax required as a license fee. The business carried on by the corporation in New York was not a transaction of commerce: *Phila. Fire Ass.* v. *New York*, 118 U. S.

TRUST.

Deed of—To Secure a Debt—Insurance Money in Hands of Trustee —Proper Application.—A trustee, in pursuance of a provision in the deed of trust, received insurance money for a loss by fire of the buildings on the mortgaged premises, in a case where the trust deed required the mortgagor to keep the property insured for the further security of the debt, which had not matured and become payable: *Held*, that the money so received took the place of the buildings destroyed, and was in the trustee's hands a part of the security for the debt: *Fergus* v. *Wilmarth*, 117 Ill.

In such case, the trustee is the agent of both the mortgagor and the holder of the mortgage debt, in respect to the money, and as the principal debt was not due, and no default had been made in the payment of the interest, the trustee could not apply the fund to the reduction of the debt without the consent of the debtor. Nor could he pay over the same to the mortgagor on his mere promise to expend the same in replacing the buildings destroyed: *Id.*

A mortgagor insured the buildings on the premises in the name of the trustee, as a further security for the debt. Before the mortgage debt became due, a loss by fire occurred, and the insurance company paid the insurance money to the trustee, who retained the same, the mortgagor being unwilling to have it applied in reduction of the debt, and, on the request of the mortgagor, deposited the same in a bank of good credit and standing at the time, but which afterward failed. At no time did the trustee have the note or trust deed in his possession, and he did not receive the money as the agent of the creditor: *Held*, on bill to foreclose the deed of trust, that the mortgagor was not entitled to have any part of the insurance money, so received by the trustee, and afterwards lost by the failure of the bank, applied as a payment on the mortgage debt: *Id*

VENDOR AND PURCHASER.

Notice—Equity—Occupant on Premises.—A purchaser of land is conclusively presumed to have notice of all equities of persons other than his vendor, in possession of the premises. He should be diligent in informing himself of the condition of the title, and any loss incurred in consequence of his failure to do so, as between him and the occupant, must be borne by the former: 95 or 96 N. C.

WASTE. See *Landlord and Tenant.*

WATERS AND WATER-COURSES.

Deed—Description—Bounded by Creek.—Where a lot was conveyed by deed by the following description: "Bounded on the north by lot T., *on the west by Wood creek;* on the south by lot marked 228; on the east by William street, the lot hereby conveyed being 55 feet in length along William street, and about 30 feet in width from Wood creek to William street;" and the evidence showed that the bank of the creek bounding it was precipitous, being a natural stone wall, 12 to 15 feet high, and that no attempt had been made to use waters of the creek for a power or otherwise: *Held*, that the description in the deed was not intended to include any part of the waters of Wood creek, or any water-rights therein: *Hall* v. *Whitehall Water Power Co.*, 103 or 104 N. Y.

WILL.

Executor a Legatee—Witness—Release—Commissions—Costs.—An executor who is a also a legatee, but who has put in evidence a release under seal of his legacy, may be competent to prove the will, and also to testify as to conversations and transactions had by him with the testator at the time of its preparation, in relation to its contents and execution; his interest as legatee being extinguished by the release, and going to the residuum, to be distributed under the will: *In re Will of Wilson, deceased*, 103 or 104 N. Y.

An executor seeking probate of a will is not incompetent as a witness to conversations and transactions had by him with the testator at the time of the preparation of the will, by reason of being a party to the proceeding, or being interested by way of commissions as executor: *Id.*

Where, in proceedings to contest the probate of the will, judgment is given in favor of the executor, it is error for the court to allow their costs to the unsuccessful contestants: *Id.*

Validity of—Undue Influence—Burthen of Proof—Concluding Argument to Jury.—The action of the court below in giving the conclusion of the argument to counsel for either side is not reviewable on error: *Blume* v. *Hartman et al.*, 113 or 114 Penn. St.

Where a will is written by a stranger, who is by its terms the principal beneficiary, the burthen of proving that the testatrix was fully acquainted with its contents lies upon him, and, accordingly, to him belongs the right to begin and conclude the argument to the jury: *Id.*

But where, as in the present case, the will is written by a son of the testatrix, who was the principal beneficiary, the burthen of proving undue influence is upon the contestants, and they have the right to conclude the argument; although this burthen was upon the contestants, the fact that there was strong evidence that the will had never been read nor explained to the testatrix, justified the court in charging the jury, that if they believed that testatrix was physically unable to read the will, and that it was not explained to her, the burthen was upon the proponent to show that it was properly made in accordance with instructions from the testatrix: *Id.*

This instruction to the jury was not inconsistent with giving the contestants the closing of the argument, and in this there was no error: *Id.*

WITNESS See *Will.*