presumed that the court will be guilty of such an injustice. But since this presumption must be made somewhere, why should it not be made in favor of that branch of the government on which the duty to be performed is primarily imposed as readily as in favor of its co-ordinate? Such a presumption, however inapplicable to an inferior officer, does not seem inappropriate to a magistrate who is clothed by the Constitution with the supreme trust of taking "care that the laws be faithfully executed," and who is privileged, in the execution of his office, to consult the judges of this court as his legal advisers.

We think, therefore, that the court has no jurisdiction to issue its writ of *mandamus* to compel the defendant to perform the duty which in this case he is alleged to have disregarded.

Of course, in coming to this conclusion, we unequivocally admit that the governor of the state is amenable to the court like any other person for his private acts, or for any act not properly within the scope of his office, though done under the color of his office.[1] * * * * * * * * * *

The application is dismissed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[2]

SUPREME COURT OF VERMONT.[3]

Constitutional Law.

Regulation of Commerce.—The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise. And it is for Congress to determine when its full power shall be brought into activity, and as to

[1] The rest of the opinion relates merely to the point that the action of the governor, in delaying the convening of a court-martial for twenty-one days, is not such a refusal to do so as would make a case for the issue of a peremptory *mandamus*, even if the court had jurisdiction.—Ed. Am. Law Reg.

[2] From vol. 3 of Wallace's Reports.

[3] From W. G. Veazey, Esq., State Reporter; to appear in 38 Vt. Rep.

the regulations and sanctions which shall be provided: *Gilman* v. *Philadelphia*, 3 Wall.

This power, however, covering as it does a wide field, and embracing a great variety of subjects, some of the subjects will call for uniform rules and national legislation; while others can be best regulated by rules and provisions suggested by the varying circumstances of different places, and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce may be exercised by the states: *Id.*

To explain. Bridges, turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than that which will ever be transported on the water which it obstructs. Accordingly, in a question whether a bridge may be erected over one of its own tidal and navigable streams, it is for the municipal power to weigh and balance against each other the considerations which belong to the subject —the obstruction of navigation on the one hand, and the advantage to commerce on the other—and to decide which shall be preferred, and how far one shall be made subservient to the other. And if such erection be authorized in good faith, not covertly and for an unconstitutional purpose, the Federal courts are not bound to enjoin it: *Id.*

However, Congress may interpose whenever it shall be deemed necessary, by either general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme: *Id.*

Annunciating these principles on the one hand and on the other, the court refused to enjoin, at the instance of a riparian owner, to whom the injury would be consequential only, a bridge about to be built, under the authority of the state of Pennsylvania, by the city of Philadelphia, over the river Schuylkill, a small river—tidal and navigable, however, and on which a great commerce in coal was carried on by barges—which river was wholly within the state of Pennsylvania, and ran through the corporate limits of the city authorized to erect the bridge; and on both sides of which citizens in great numbers lived, and on both sides of which municipal authority was exercised, on one as much as on the other; the bridge being a matter of great public convenience every way, and another bridge, just like it, having been erected and in use for many years, over the same stream, about five hundred yards above: *Id.*

Execution.

Interest—Contract.—Where attached property becomes by process of law changed into money in the officer's hands, and is invested by him so as to produce interest, such interest belongs to the party entitled to the money, and not to the officer: *Richmond* v. *Collamer*, 38 Vt.

The plaintiff, an officer, attached certain property belonging to S. and sold it, in pursuance of the statute, at auction. The defendant bid off the same and gave his note therefor, payable to the plaintiff on demand with interest, and the property passed into the hands of S., the defendant acting in behalf of S. as his friend and agent. Subsequently the

suit was settled, and the plaintiff, being directed by the creditor to surrender to S. all the property and securities in his hands derived from the attachment, gave up said note, upon receiving a written promise from the defendant to pay the accrued interest thereon, the defendant supposing the plaintiff was legally entitled to the same, and the plaintiff claiming it on this ground. *Held*, that the plaintiff had no legal right to collect the interest on the note, and that there was no consideration growing out of the surrender of the note and the defendant's promise to pay the interest, which will support the promise: *Id.*

Frauds, Statute of.

Contract for Growing Timber.—The defendant agreed by parol to cut into logs all the trees standing on a certain-described piece of land belonging to the defendant, and to draw and deliver said logs, together with others already cut on said land, at the plaintiff's mill, within a certain time, the plaintiff to pay a specified price per cord when all were delivered and measured at the mill. *Held*, that the contract was within the Statute of Frauds, and could not be enforced by action: *Ellison et al.* v. *Brigham*, 38 Vt.

Incest.

Pleading.—In an indictment for the crime of incest each count should charge but one offence and specify the particular day when committed, in accordance with the general rule of criminal pleading: *State* v. *Temple*, 38 Vt.

Where one count alleged that the respondent committed this offence "on the 20th day of September, A. D. 1860, and on divers other days and times between said 20th day of September and the 9th day of December, A. D. 1862," it was held bad, upon motion in arrest of judgment, in that it alleged a series of offences, and that too without specifying any particular day when each was committed except the first. The *continuendo* could not be rejected as surplusage, as the substance of it was not wholly immaterial to the guilt or innocence of the accused: *Id.*

Negligence.

Injury on Highways.—The plaintiff was travelling in company with three other persons, and had occasion to leave the wagon for a few minutes, and, while out, heard a team coming down the hill towards him, and, being blind and ignorant of the character of the road, and the night so dark nobody could see him, left the travelled part of the road to secure his personal safety, and in so doing stepped over a bank wall and received the injury complained of. *Held*, that he was justified by necessity in leaving the travelled path, and if in so doing he acted with reasonable care and prudence he cannot be said to have contributed to his own injury: *Glidden* v. *Reading*, 38 Vt.

When a traveller receives an injury out of the travelled path, it is not necessary to a recovery that he should have been "forced out by unavoidable accident or circumstances beyond his control." Where he leaves voluntarily but from a reasonable fear of injury if he remain, it is in the eye of the law a leaving from necessity: *Id.*

Held, that under the circumstances of the case the court correctly instructed the jury that "the plaintiff had a right to presume that the road was reasonably safe in its surface, margin, and muniments:" *Id.*

As it did not appear that the persons riding with the plaintiff were in his service or employment, or owed any duty to, or had any care of him, either permanent or temporary, the defendant town had no right to have the jury charged that the plaintiff could not recover if any want of care or prudence on the part of these persons contributed to his injury: *Id.*

Highways and Bridges—Pleading.—In an action to recover damages for an injury occasioned by a defect in a highway, a declaration describing the highway and its defects in general terms, without describing what and where the defects were, *held* good: *Powers* v. *Woodstock*, 38 Vt.

Prize.

Relative Force of Captor and Enemy.—On a question under the Act of Congress of July, 7th 1862, which distributes prize-money according to the fact whether the captured vessel is of equal or superior force to the vessel or vessels making the capture, it is proper to consider as the capturing force, not only the flag-ship, leading, actually firing and by her fire doing the only damage—immense damage—done; but also any other vessel which, by having diverted the fire of the vessel forced to surrender, by an obviously great force, by its position, conduct, and plain purpose to come at once into the engagement and to inflict perhaps complete destruction, may have hastened the surrender: *The Iron-clad Atlanta*, 3 Wall.

Slander.

Pleading—Evidence.—Where the words charged are divisible without materially changing the sense, or constitute two distinct slanders or charges against the plaintiff, the defendant may justify one and rely on the general issue in defence of the other: *Nott and Wife* v. *Stoddard*, 38 Vt.

In a declaration for slander the plaintiff may allege the meaning of the defendant in the language used, and if the defendant attempt to justify the language, he must justify it in the sense alleged: it is not sufficient to justify the very words: *Id.*

Testimony of witnesses that during a certain period they heard reports of the accusation by the defendant against the plaintiff, is admissible, if the accusation was made before the period referred to by the witnesses, as tending to show the consequences of the defendant's wrongful act, it being understood that the reports were that the defendant made such accusation, not that certain persons repeated the accusation under such circumstances as to make themselves liable: *Id.*

Evidence of the effect of the slander upon the plaintiff is admissible to the extent of the direct and natural consequences of the defamatory words spoken: *Id.*

C., at the instance of the plaintiff, inquired of the defendant as to the report that he had charged the plaintiff with stealing wood, to which the defendant replied that it was so, he saw it himself, and went on to