the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

I have endeavored to show, not only that the end which the statute under consideration seeks is legitimate and within the scope of the Constitution, but that the means employed by Congress are appropriate and adapted to the end of raising and supporting armies, and therefore within the powers of Congress under the Constitution. Without entering upon a discussion, whether the state may, in view of the legislation of Congress, impose a penalty upon the citizen for withholding the money in question, and alone regulate and control contracts between citizens of the state in reference to compensation for such services as those by Fairchilds for Penrose, it will be recollected that a law of Congress, if constitutional, prohibits and supersedes all state legislation on the same subject: 1 Parker C. R. 67. That while the state law might control in reference to these questions in the absence of any exercise by Congress of its constitutional powers on the subject, yet so far as Congress does constitutionally act, the state laws are so far superseded, and the citizen cannot be punished by both sovereignties for the same offence.

Sections 12 and 13 of the Act of Congress are held to be constitutional; the demurrer is overruled, with leave for defendant to plead to the indictment.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF NEW HAMPSHIRE.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

BROKER.

Earning of Commissions.—A real estate broker is the agent of the

[1] From J. William Wallace, Esq.; to appear in Vol. 6 of his Reports.

[2] From the Judges of the Court. The volume in which they will be reported cannot yet be indicated.

[3] From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

[4] From P. Frazer Smith, Esq., Reporter; to appear in 54 Pa. State Rep.

vendor. There must be an employment to constitute him an agent, and his services however slight must be the efficient cause of the sale: *Earp* v. *Cummins*, 54 Penna.

If the mere introduction of the property of the buyer, an advertisement or any other service be the immediate and efficient cause of the bargain, the broker earns his commissions: *Id.*

But if the services of the broker do not accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to buy, the broker has no right to commissions: *Id.*

CONTRACT.

Affirmance and Rescission.—When a plaintiff is in a condition to rescind a contract he may recover back in *assumpsit* the money paid on it: *Crossgrove* v. *Himmelrich*, 54 Penna.

Where an action is in disaffirmance of a contract to recover back the price paid, and it appears that the plaintiff has complied with his part, up to the time of electing to rescind, tender or offer of the money which would have been due on completion is not essential: *Id.*

Where an action is in affirmance of a contract, an offer of readiness to pay is material: *Id.*

CORPORATION.

Effect of Forfeiture of Charter on Debtors of the Corporation.—Where a bank charter is forfeited by *quo warranto* and the corporation is dissolved, and a trustee appointed by judicial order made under statute to collect the debts due to it and apply them to the payment of debts which it owes, does so collect them and pay—any surplus, by the laws of Mississippi, and by general laws of equity, will belong to the stockholders: *Bacon* v. *Robinson*, 18 Howard, affirmed: *Lum* v. *Robertson*, 6 Wall.

A delinquent debtor cannot, in such case, plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders; nor (having no meritorious defence) plead that a subsequent trustee in the settlement of the bank's concerns, has no right to sue, because the first one was discharged, his duties being accomplished; the second one having been appointed (after a decision by this court declaring that he could be rightfully appointed) for the purpose of completing the trust by collecting the surplus assets and distributing among the stockholders: *Id.*

Paying in of Capital—Liability of Subscribers.—By the act of subscribing to the capital stock of an incorporated association, each associate undertakes to raise his proportion of the capital as it may be called for by the directors: *The Merrimac Mining Co.* v. *Levy*, 54 Penna.

The law authorized the directors to call in the subscription, this ordinarily implies a corresponding duty to pay: *Id.*

The articles of association under the law, contemplated a substantial capital for defined purposes; this was both to carry out the object of the corporation and for the protection of creditors, and therefore created a personal liability for the subscriptions: *Id.*

A purchaser from an original subscriber is substituted to his obligations as well as his rights, and, being accepted by the corporation, a privity is established between them: *Id.*

Canal Co. v. *Sansom*, 1 Binn. 70, and *Palmer* v. *Ridge Mining Co.*, 10 Casey 288, criticised: *Id.*

In a suit arising under a charter of another state, the decisions in that state are the best evidence of the rights and duties of stockholders under it: *Id.*

Rights of Stockholders to unissued Stock—Enlargement of Powers.—A corporation was created with a defined capital only part of which was subscribed; the directors had power to receive subscriptions and issue certificates for the untaken stock, and the holders became stockholders and entitled to equal rights with the original stockholders: *Curry* v. *Scott*, 54 Penna.

If a stockholder has not paid his subscription in full, he owes for what is unpaid, but he is none the less a shareholder: *Id.*

An old stockholder's right to subscribe to the untaken stock is not superior to the right of one who owned no stock: *Id.*

Reese v. *The Montgomery County Bank*, 7 Casey 78, explained: *Id.*

An Act of Assembly authorizing the issue of preferred stock, if accepted by the stockholders, authorizes such issue by the directors, although individual stockholders may oppose it: *Id.*

The legislature may confer enlarged powers upon the managers of a corporation with the assent of the shareholders, and no one stockholder, by refusing his assent, can hinder the exercise of the enlarged powers: *Id.*

Criminal Conversation.

Consent or Negligence of Plaintiff.—The law is now clearly settled to be that if it appears, in an action for criminal conversation, that the husband consented to his wife's adultery, it goes in bar of the action: *Bunnell* v. *Greathead*, 49 Barb.

If he was guilty of negligence, or of loose or improper conduct not amounting to a consent, it goes in reduction of damages: *Id.*

If the husband had it in his power, and neglected to interpose, to prevent the debauchment of his wife, he can recover only the actual pecuniary damages which he sustained: *Id.*

Debtor and Creditor.

Fraudulent Conveyance by Debtor in Failing Circumstances.—A debtor, in failing circumstances, cannot, even for a valuable consideration, sell and convey his land, ostensibly without reservation, but really reserving to himself the right to possess and occupy it for a limited time for his own benefit. Nor will this rule of law be changed by the fact that the right thus to possess and occupy for the limited time is a part of the consideration of the sale; the money part of it being made, on this account, proportionably less: *Lukins* v. *Aird*, 6 Wall.

Easement.

Surface Rights in Land.—A grant of a surface right with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt," is the grant of an easement only although in fee: *Big Mountain Improvement Co's Appeal*, 54 Penna.

An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit: *Id.*

EQUITY.

Equity Practice and Jurisdiction—Adoption by Federal Courts of State Practice.—Though usually where a case is not cognisable in a court of equity the objection must be interposed in the first instance, yet if a plain defect of jurisdiction appears at the hearing or on appeal, such court will not make a decree: *Thompson* v. *Railroad Companies*, 6 Wall.

Though state legislatures may abolish in state courts the distinction between actions at law and in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the Federal courts. Hence, if the civil action brought in the state courts is essentially, as hitherto understood, a suit at common law, the common-law form and not an equitable one must be pursued if the case is removed into a Federal court: *Id.*

Nor does the fact that by statute in the state courts "the real parties in interest" must bring the suit, whereas in the Federal courts in a common-law suit, such as was presented in the civil action brought in the state courts, one party would sue to the use of another, change this rule. A plaintiff in the state court may remain plaintiff on the record in a Federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute it in the state courts: *Id.*

INSURANCE.

Floating Policy.—Four insurance companies insured machinery, &c., in buildings in a described enclosure with the following condition annexed to their policies: "If at the happening of any fire the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally in various places, not designated, and yet within limits which include the premises or property herein insured, such policy, as between the assured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess." Other insurance companies insured on *specific* property in the same enclosure. In a loss by fire, *held*, that the liability of the four insurance companies was not confined to the *excess* of loss above that covered by the specific insurances: *Merrick* v. *Germania Fire Insurance Co.*, 54 Penna.

The four companies were liable to contribute rateably on the property insured in the specific policies which was covered by their general policies. Per THOMPSON, J.: *Id.*

Where the underwriters have left their design doubtful by using obscure language, the construction will be most unfavorable to them: *Id.*

LANDLORD AND TENANT.

Where the landlord and owner of premises in fee, claiming that the

term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands, and attempt to dislodge the former by force. The landlord, being in the actual possession, has a right to maintain it, and to use force, if necessary, for that purpose: *Sage* v. *Harpending*, 49 Barb.

Limitations, Statute of.

Commencement of Suit.—A suit is to be regarded as commenced so as to avoid the Statute of Limitations, when the writ is completed with the purpose of making immediate service: *Mason* v. *Cheney et al.*, Sup. Ct. N. H.

If completed except affixing a revenue stamp, but the purpose is to serve it without, the suit will be regarded as commenced at the date of the writ: *Id.*

But if retained several days for the want of a stamp, and then it be affixed, and nothing more is shown, the suit must be considered as commenced when the stamp was affixed: *Id.*

Mandamus.

Granting, a matter of Discretion.—The granting or refusing of the writ of *mandamus* is a matter of discretion. To entitle a party to that remedy, there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself: *The People, ex rel. Duff*, v. *Booth, Mayor of Brooklyn*, 49 Barb.

Where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of a city, by the comptroller, is entitled to the money, there being another claimant, who has sued the city therefor, the mayor is not obliged to sign the warrant; and cannot be compelled to do so, by *mandamus*: *Id.*

Military Service.

Quota—Deserter.—The facts that a person has enlisted, been mustered into the military service of the United States, and has since deserted, may be proved by evidence other than the record. Parol proof that such person served as a soldier for several weeks, and that he then deserted, has a legal tendency to prove the enlistment, mustering in, and desertion. Upon proof of a custom of the trade known to the parties, by which the substitute broker was understood to warrant that the substitute was not a deserter, it will be taken that the contract was made in reference to such custom, and a warranty will be implied: *Town of Lebanon* v. *Heath*, Sup. Ct. N. H.

Where a town paid to such broker money for a substitute who afterwards proved to be a deserter, and was dropped from the credit of the town, it was held that the sum so paid might be recovered back in an action for money had and received: *Id.*

Mining Lease.

Covenants—Damages.—In a lease of a coal-mine, the lessee stipulated that he would pay a rent for coal taken out and also mine a certain number of tons annually. *Held*, that settlements for coal taken out, were

not as matter of law a discharge of a breach in not taking out the stipulated quantity: *Powell* v. *Burroughs et al.*, 54 Penna.

The covenant for rent for coal mined, was distinct from the covenant to mine a certain quantity: *Id.*

Two mines belonging to the same lessors, the one contiguous to the other, were leased by two leases to one lessee. One stipulation in each lease was that the lessee was not bound to mine more coal than could be taken away by cars furnished by a railroad company named. It was no excuse for not working one mine that the cars furnished, were not sufficient to take away the coal mined in the other: *Id.*

That the coal which the lessee failed to take out according to his covenant, was of greater value to the lessor at the end of the lease than if it had been taken out, is not a ground for reducing the claim for the breach to nominal damages: *Id.*

The rent per ton agreed for was stipulated damages to the extent of the non-performance: *Id.*

The uncertainty as to the extent of the injury, is a criterion to determine whether it is a penalty or liquidated damages: *Id.*

New Trial.

Practice—After-discovered Evidence.—A new trial will not be granted on the ground of newly discovered evidence, where the party who has lost the verdict has a right to the new trial by review, unless the newly discovered evidence has been kept from his knowledge by the misconduct of his adversary: *Ordway* v. *Haynes*, Sup. Ct. N. H.

Pleading.

Payment an affirmative Plea.—If the defendant relies upon payment as a defence, either upon the general issue or a special plea, the burden rests upon him to prove payment: *Kendall* v. *Brownson*, Sup. Ct. N. H.

If the court in their discretion allow leading questions, it will be presumed, unless the contrary appears, that there was a proper case for the exercise of the discretion: *Id.*

Replevin.

Avowry for Rent.—In an avowry in replevin for rent in arrear, the rent reserved must be accurately stated, the rent in arrear need not be: *Phipps* v. *Boyd*, 54 Penna.

Waltman v. *Allison*, 10 Barr 464, remarked upon: *Id.*

An averment in an avowry that the plaintiff held under a lease reserving to the defendant a specified rent, is supported by evidence of a lease to the plaintiff by a former owner reserving the described rent, and that such owner had conveyed to the defendant: *Id.*

Rent may be described as reserved to the reversion: *Id.*

That the leased premises had been conveyed after the lease to defraud creditors, is no defence by the lessee against the avowry of the grantee: *Id.*

None but those intended to be postponed or defrauded are within the protection of the statute of Elizabeth: *Id.*

SHIPPING.

Master's powers to sell his Ship in a distant Port—Divesture of Liens on it—Title passing by Possession taken after Sale.—In order to justify the sale by the master of his vessel in a distant port, in the course of her voyage, good faith in making the sale, and a necessity for making it must both concur; and the purchaser, before he can make out a title, must show their concurrence. The question is not whether it is expedient to break up the voyage and sell the ship, but whether there was a legal necessity to do it. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed and the perils to which the property is exposed: *The Amelie*, 6 Wall.

Where the sale of a vessel owned in Amsterdam was made by public auction, at Port au Prince, after a careful survey by five persons—one the British Lloyd's agent, another the agent of American underwriters, and the remaining three captains of vessels temporarily detained in port—the whole appointed by and acting under the authority of the consul where the vessel was owned, which five surveyors unanimously agreed that the vessel was not worth repairing, and advised a sale of her, the sale was held good—no evidence being before the master that the report was erroneous—although the master did not consult his owners at Amsterdam, and though the vessel, afterwards, at a vast expense—greater, as the court assumed, than her new value—was repaired and went on to her original port of destination, and thence abroad with another cargo: *Id.*

A valid sale by the master of his ship in a distant port, divests all liens upon her: *Id.*

A bill of sale by the master is not essential to pass mere title. The sale followed by possession taken does this: *Id.*

STREETS.

Report of Commissioners of Estimate and Assessment—Power of Commissioners.—After the report of commissioners to estimate the expense, and assess the damages, of widening a street in a city have been appointed and have made their final report of estimate and assessment, which has been confirmed by the County Court, and the proceedings have been reversed, on *certiorari*, by judgments of the Supreme Court, such commissioners have no power to file another report of estimate and assessment, in the same matter; their appointment being annulled by such judgment, and the commissioners being thenceforth *functi officio*: *The People* v. *The City of Brooklyn*, 49 Barb.

TEXAS.

Annexation—Alienage of Citizens of United States—Texas Statutes of Fraud and of Limitations.—A citizen of the United States, and who, as such, was of course before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became on the admission, competent, no office having been previously found: *Osterman* v. *Baldwin*, 6 Wall.

A purchaser at sheriff's sale buys precisely the interest which the

debtor had in the property sold, and takes subject to all outstanding equities: *Id.*

Trusts of real estate are not embraced by the Statute of Frauds of Texas, and may be proved, as at common law, by parol: *Id.*

A mere declaration in writing by a vendor, of a vendee's purchase of land, that the vendee had paid the money for it, and that the vendor intended to made deeds when prepared to do so, is not a document purporting to convey title; and accordingly will constitute neither a link in "a consecutive chain of transfer," nor "color of title," within the meaning of the 15th section of the Statute of Limitations of Texas: *Id.*

TROVER.

Goods Attached.—Trover may be maintained by an officer against a receipter for goods attached in mesne process, where the receipter received them upon giving the officer a written undertaking "to deliver the same or the value thereof on demand," if upon demand by the officer the goods are not delivered, nor the value thereof paid: *Holt* v. *Burbank*, Sup. Ct. N. H.

VENDOR AND VENDEE.

Sale of Timber—Agreement to cut, &c.—In a sale of the wood and timber standing upon a certain lot of land, it was stipulated that vendees might cut, carry away, and dispose of it, provided they paid over the proceeds thereof to the vendor as fast as sold and paid for, subject to the approval of the vendor, to the amount of $6000 and interest: it was *held*, that vendees were to pay over the gross proceeds of the wood and timber without deducting the cost of cutting and taking to market; and it was also *held*, that the contract being under seal, a subsequent parol agreement that these expenses should be deducted, could not affect it: *Murphy* v. *Garland et al.*, Sup. Ct. N. H.

Contract not completed.—B. and C. gave their note to A. for land which A. conveyed to both jointly. It was afterwards agreed that C. should convey his interest in the land to B., and that B. should pay the whole note to A., and that C. should be discharged from paying any part of the note. A. consented to this, and C. conveyed the land to B. accordingly. A. can recover the whole amount of the note against B. in an action for money had and received: *Woodbury* v. *Woodbury*, Sup. Ct. N. H.

One B. W. sold and delivered to the plaintiff a promissory note payable to said B. W. or order. Plaintiff in the presence, at the request, and by the direction of said B. W. indorsed the name of the said B. W. on the back of said note, for the purpose of transferring the legal title in the note to the plaintiff. Plaintiff then brought suit in his own name against the signer of the note. *Held*, that the suit might be maintained; that there being no question raised as to the good faith of the transaction, the indorsement was well enough: *Id.*

A. died leaving B. his executor and also his residuary legatee. B. accepted the trust as executor and gave bond, as required by law, and took possession of all the property of A., amongst which was a note against the defendant payable to A. or order, and not indorsed. B. sued

this note in his own name, but not as executor. *Held*, that he could not recover: *Id.*

Where a defendant has been defeated and a subsequent attaching creditor appears by leave of court to defend, such creditor may in some instances be allowed a claim of the defendant against the plaintiff in offset to the plaintiff's claim: *Id.*

Where goods are wrongfully taken or detained, the former owner cannot waive the tort, and maintain *assumpsit* for the value of the goods: *Id.*

But where the goods have been sold and converted into money, *assumpsit* for money had and received may be maintained to recover the money: *Id.*

In this state when a person, under a contract to purchase, enters upon land with the consent of the vendor, and the contract of purchase and sale is not carried out because the purchaser fails or refuses to pay as he agreed, the vendor may treat him as a trespasser or as a tenant at will at his election, and may maintain either trespass or *assumpsit* for use and occupation: *Id.*

WILL.

Sunday—Uncertainty.—All secular work, business, or labor on Sunday is prohibited, whether it be in a person's ordinary calling or not, unless it is excepted by the statute: *George* v. *George*, Sup. Ct. N. H.

Any such business or labor done on that day is to the disturbance of others within the meaning of the statute, if done in their presence, whether with or without their consent: *Id.*

The execution of a will on Sunday is not secular business or labor within the statute: *Id.*

In the case of a devise upon condition subsequent, and the condition afterwards becomes impossible, or is void for uncertainty, the estate of the donee is made absolute: *Id.*

A gift by the husband to the wife of all his property, with a provision that she shall, by deed or will, convey the homestead farm to her heir in the line of the testator, vests the estate in her immediately upon his death, and if there be no such heir her estate is absolute: *Id.*

If the will may take effect in any part, it may properly be admitted to probate, although some bequests be void for uncertainty: *Id.*

Unsound Mind—Lucid Intervals—Evidence.—A tetsator was found to be a lunatic with lucid intervals, and after the finding made a will; in a feigned issue on this will, instructions given by him a short time before he was found lunatic, for another will, which was drawn accordingly, and which was different from that in dispute, were proper evidence: *Titlow* v. *Titlow*, 54 Penna.

A change of intention is of no importance if there be a sound mind unconstrained, but when the question is whether there be such a mind, such change may be adduced to aid the inquiry: *Id.*

That the testator had frequently said, within ten years before his death, that he liked a brother better than his other relations, is not evidence on the question of sanity: *Id.*

A legatee under a will immediately preceding that in contest, is a competent witness against the latter will: *Id.*