governor of a state as an election officer, and to punish him through the national courts for malfeasance and nonfeasance in office: *Kentucky* v. *Dennison*, 23 How. 66. And especially would this seem to be so in view of the fact that the certificate of the governor is not binding upon Congress, each house of which is, by the Constitution, made the judge of the elections, returns, and qualifications of its own member: Art. 1, sect. 5.

Admitting for the occasion the power of Congress to provide for the punishment of the executive of a state, as claimed by the prosecution we repeat, that in view of the foregoing considerations, it seems to be improbable that it would undertake to exercise the power. At all events, it is impossible, on any legal principles, that any such intention should be held to exist from the use of the general words, "election officers."

We have carefully considered the very able arguments which have been addressed to us to show that the governor is embraced in the more general language of sections 19 and 20 of the same act, and that, if so these words, supposed to include the governor, should, though omitted by the legislature, be inserted by official engraftment into section 22, on which the indictment is founded. In answer to the argument, we deem it necessary only further to observe that the governor is not in terms named in either of those sections; that it is far from certain that they intended to embrace any official act of this officer, and if they did, we could not after the judgment of the Supreme Court delivered by Chief Justice MARSHALL, in The *United States* v. *Wiltberger*, *supra*, enter upon the dangerous and unauthorized work of incorporating the provisions of one section of a law into another. We could never be sure that we did not put in what Congress may have purposely left out. The bill charges no indictable offence, and the demurrer thereto must be sustained.

CALDWELL, District udge, concurred.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]
SUPREME COURT OF MISSOURI.[2]
SUPREME COURT OF NEW YORK.[3]
SUPREME COURT OF PENNSYLVANIA.[4]

ADMINISTRATION.

Payment of Claims.—Under our statute, an administrator is not authorized to pay claims allowed until an order to that effect has been made by the court: *Dullard's Admin'r.* v. *Hardy*, 47 Mo.

[1] From James B. Black, Esq., Reporter; to appear in 33 Ind. Rep.
[2] From C. C. Whittelsey, Esq., late Reporter; to appear in 47 Mo. Rep.
[3] From Hon. O. L. Barbour, Reporter; to appear in vol. 60 of his Reports.
[4] From P. F. Smith, Esq., Reporter; to appear in 66 Penna. State Rep.

CORPORATION.

Violation of Charter—Interest.—A corporation authorized by its charter to take and receive a particular rate of interest upon loans and discounts, violates its charter and may be proceeded against for a forfeiture, if it take and receive a greater rate than that permitted by the charter: *Attorney-General* v. *Boatmen's Sav. Inst.*, 47 Mo.

Promissory Note.—A corporation known as "The Aurora Brewing and Malting Company" executed a note signed "C. C. Kelsey, Ass't Sec'y Aurora Brewing and Malting Company." *Held*, that this was the note of the corporation, and not that of C. C. Kelsey personally: *Gaff et al.* v. *Theis*, 33 Ind.

DEBTOR AND CREDITOR. See *Fraudulent Conveyance.*

DECEDENT'S ESTATE.

Set-Off—Another Action Pending.—A judgment for costs against a decedent's estate, to enforce which a suit by the judgment-plaintiff against the administrator upon his bond is pending and undetermined, cannot be set up as a set-off in a suit by said administrator against said judgment-plaintiff upon a note executed by the latter to the decedent: *Nave* v. *Wilson*, 33 Ind.

Where an account has been filed as a claim against a decedent's estate, and final judgment on the merits of the cause has been rendered, such judgment, remaining in force, is a bar against said account as a set-off in a suit by the administrator of said estate against the claimant upon a note executed by the latter to said decedent: *Id.*

DEED.

Delivery.—There can be no delivery of a deed except by the express or presumed assent of the grantee. Although in some cases a delivery may be presumed, yet when it is shown that the grantee expressly refuses to accept, the deed does not convey the title: *Rogers* v. *Carey*, 47 Mo.

ESTOPPEL. See *Insurance.*

EVIDENCE.

Proof of Facts not alleged in the Complaint.—Words used by a vendor, during a negotiation for the sale of land, respecting the title, and susceptible of sustaining a separate allegation of fraud in the complaint, but not inserted therein, may be used as evidence to sustain the allegations that are contained in the complaint, if employed during the same conversation with the latter allegations and incapable of separation from them: *Updyke* v. *Abel*, 60 Barb.

FACTOR.

Bankruptcy—Discharge.—A factor, under the Bankruptcy Act of 1867, occupies a fiduciary relation to his principal, and the debt due for goods sold by the commission merchant is not released by the discharge in bankruptcy: *Lenke* v. *Booth*, 47 Mo.

Forgery.

A party was intrusted with checks signed in blank for a particular purpose; he struck out the words "to order," and filled up the blank, and deposited the check to his own account in bank. *Held*, that he was guilty of forgery in making a false instrument: *State* v. *Kroeger*, 47 Mo.

Fraud. See *Vendor and Purchaser.*

Frauds, Statute of.

Agreement within.—The plaintiff's farm being sold on a mortgage foreclosure, was bid off for $2400 by W., who agreed orally with the plaintiff to let him have the farm back on the payment of the said sum of $2400 and the sum of $20 for expenses. The plaintiff failed to procure the money, or security, within the time limited; the time was extended, and within the extended time he procured the defendant to take a conveyance from W., upon the terms on which W. had agreed to convey to the plaintiff. And it was then agreed, by parol between the parties, that the plaintiff should remain in possession and receive the rents and profits, and with them and from other sources refund to the defendant what he had paid or should pay or secure to W., and that on such payment the defendant should convey the premises to the plaintiff. *Held*, that the agreement of the defendant to convey the premises being by parol was void by the Statute of Frauds, and could not be enforced in equity: *Loomis* v. *Loomis*, 60 Barb.

Held, also, that the plaintiff having, at the time of making the agreement, no title or interest in the premises, and there being no legal consideration received from him for the promise made by the defendant, that was another difficulty thrown in his way by the Statute of Frauds: *Id.*

Fraudulent Conveyances.

The New York Statute of Uses and Trusts only makes conveyances fraudulent and void as against the creditors of the grantor at the time of the conveyance: *Lovemore et al.* v. *Campbell et al.*, 60 Barb.

Even though a conveyance be voluntary, it may be upheld as against the subsequent creditors of the grantor: *Id.*

A finding of fact by a referee that conveyances were made with intent to hinder, delay, and defraud the future creditors of the grantor, when the whole case shows that there were then no creditors to be defrauded, is, in law, simply absurd, or rather, a legal impossibility: *Id.*

Guaranty.

Notice—Lease.—It was stipulated in a lease for two years that the lessee should pay the lessor rent, in a certain sum for the entire period, in two equal payments, for which the lessee agreed to give his notes with surety to the satisfaction of the lessor. Certain third persons executed an agreement annexed to the lease, as follows: "We guarantee that" the lessee "shall perform his agreements in the foregoing contract." The lessee took possession, and failed to execute such notes or pay the sum due, of which notice was given to the guarantors ten months after the commencement af the lease. *Held*, that the guarantors were not released from their liability as such as to the payment of the money, by the neglect of the lessor to notify them at an earlier date of the failure of the lessee to give the notes: *Leonard* v. *Shirts*, 33 Ind.

INSURANCE.

Notice—Waiver.—A condition in a fire policy was that notice of a fire should be given to the "secretary forthwith." The morning after the fire, the insured and the local agent of the company, with his counsel, visited and examined the premises; the insured was examined on oath, his statement signed by him was sent next day by the agent to the secretary. *Held*, that this was a compliance with the condition: *Beatty* v. *Lycoming Ins. Co.*, 66 Pa.

The condition required that there should be given to the secretary within thirty days "a particular account of such loss." The notice was a loss of "household furniture $367, groceries $233," the same as in the policy. *Held*, that the court below properly ruled that this was not a compliance with the condition: *held, also*, that the question of sufficiency should not have been submitted to the jury: *Id.*

To constitute waiver of notice, there should be some official act or declaration of the company during the currency of the time, something from which the insured might reasonably infer that the underwriters did not mean to insist on it. Mere silence is not enough: *Id.*

After the thirty days without "a particular account," nothing but an express agreement with the company would be sufficient: *Id.*

Franklin Fire Ins. Co. *v.* Updegraff, 7 Wright 350, Inland Ins. Co. *v.* Stauffer, 9 Casey 397, distinguished: *Id.*

Double Insurance—Value of Property—Payment into Court.—A fire policy contained: "*It is agreed*, That the aggregate amount insured in this and other companies, on the above-mentioned property, shall not exceed two-thirds of the estimated cash value." *Held*, that the estimated value was that at the time of insurance: *Elliott* v. *Lycoming Ins. Co.*, 66 Pa.

The value of buildings was estimated when insured at $1950, and the amount insured $1300; additions were made; the agent of the company certified that he had examined and the addition did not increase the risk. $1000 more was then insured in another company; the buildings were burned. At the time of the fire the value of the buildings was $4200. *Held*, that the first policy was forfeited for over insurance: *Id.*

If a company after notice of over insurance makes and collects assessments, they treat the contract as still subsisting and are estopped from setting up a forfeiture: *Id.*

An over insurance was made and afterwards an assessment was made; the treasurer discovering the error, notified the local agent not to collect it; the agent forgetting his instructions demanded it, but recollecting them, did not collect it. *Held*, not to be a waiver by the company: *Id.*

Under these facts, waiver was for the court: *Id.*

A judge is not bound to submit a mere spark of evidence; there must be enough to raise a reasonable question for decision: *Id.*

An insurance was on a house and stable in one policy; an over insurance was made on the house; both were burned; the company tendered payment for the loss on the stable. *Held*, not to be an affirmance of the contract, so as to estop them from setting up a forfeiture as to the house: *Id.*

Payment of money into court when the declaration is on a special contract, admits the contract so as to supersede the necessity of proving it: *Id.*

Payment of money into court is the acknowledgment of the right of action to the amount brought in, but not beyond that: *Id.*

Such payment waives no defence, although the defence be to the whole: *Id.*

After such payment the case goes on substantially as if the money had not been paid in; the defendant may take a defence which goes to the whole cause of action: *Id.*

JUDGMENT.

Irregularity in.—An auditor cannot declare a judgment on an amicable *scire facias* void and no lien, for want of a stamp on the agreement or for any other irregularity: *Edwards's Appeal*, 66 Pa.

An irregular judgment may be reversed on error, but it is good until then. An auditor can disregard a judgment only where it is void: *Id.*

LIMITATIONS, STATUTE OF. See *Sheriff's Sale.*

MUNICIPAL CORPORATION.

Bonds.—The bonds issued by a municipal corporation, although not authorized by an existing statute, become binding when the action of the corporation is subsequently ratified by the legislature: *Steines et al.* v. *Franklin County et al.*, 47 Mo.

NEGLIGENCE.

Burden of Proof.—In an action for negligence, if the plaintiff makes out a *primâ facie* case, the burden is on the defendant to disprove care, and thus establish negligence in the plaintiff: *Pennsylvania Canal Co.* v. *Bentley*, 66 Pa.

If the plaintiff's own case disclose contributory negligence he cannot recover: *Id.*

It is negligence in a traveller crossing a railroad, not to stop and look up and down, because he is bound to presume that a train may be approaching: *Id.*

Where a duty is defined, a failure to perform it is negligence and may be so declared by the court: *Id.*

Where the measure of duty is not unvarying, and a higher degree is demanded in some circumstances than in others, a jury alone can determine what is negligence and whether it has been proved: *Id.*

PARTNERSHIP.

Attorneys.—Where attorneys as partners had recovered a judgment for their client, and after the dissolution of the firm one of the partners collected the debt and failed to pay it over to the principal, the other partner is liable to an action for the money: *Bryant* v. *Hawkins*, 47 Mo.

PAYMENT INTO COURT. See *Insurance.*

PLEADING.

Promissory Note—Agent.—A promissory note payable to A. B., "agent of the Enterprise Insurance Company," was executed for the use of said company in consideration of a policy of insurance underwritten by it. *Held*, in a suit on the note in the name of said company, that the action was brought by the proper party: *Black* v. *Enterprise Ins. Co.*, 33 Ind.

An answer to a suit by an insurance company on a promissory note executed to such company in consideration of a policy of insurance issued by it, alleging that the plaintiff is a foreign insurance company, and that the contract of insurance was entered into in this state through an agent resident therein, but not also showing a non-compliance with the requirements of the Act of December 21st 1865, regulating foreign insurance companies, &c., is bad on demurrer: *Id.*

Parties—Set-Off—Promissory Note.—Suit on a note by the payee against the maker. Answer, that the note was given in consideration of the sale of a certain number of sheep purchased by the defendant of a third person named, and for no other consideration; that it was made payable to the plaintiff at the request of said third person, who *represented* that he desired it made payable to the plaintiff for the purpose of enabling him to place it in the plaintiff's hands as his agent for collection, and for no other purpose; that at the time the note was given, said third person was indebted to the defendant in a certain sum, of which a bill of particulars was annexed; and the defendant offered to set off said indebtedness against the note. *Held*, that the answer was bad, for the reason that it did not allege that the plaintiff was not the owner of the note in his own right, or that said third person had any right thereto or beneficial interest therein: *Waddle* v. *Harbeck*, 33 Ind.

In a suit by a trustee, the defendant may set off a debt due him from the *cestui que trust*: *Id.*

Suit on a note by the payee against the maker. Answer, by way of set-off, that the plaintiff was not the owner of the note and had no interest in it, but was merely the agent of a third person named, who procured the note to be made payable to the plaintiff, to enable the latter to collect it as such agent, and for no other reason; that the note was given for certain articles sold to the defendant by said third person; that at its date said third person was indebted and still continued to be indebted to defendant for goods sold and delivered by the latter to the former, of which a bill of particulars was filed, amounting to a certain sum, less than the amount of the note; that, by agreement of the parties, said note was made payable to the plaintiff for the purpose of enabling him to settle the same and receive from the defendant the excess over the amount of said indebtedness which it was agreed, when the note was made and delivered, should be applied in part payment of the note. *Held*, that the answer, if true, made the plaintiff a trustee of an express trust, under the statute, and capable of maintaining the action in his own name: *held, also*, that the answer was good on demurrer: *Id.*

PRACTICE.

Objections must be made in Season.—If there is any foundation for the objection that a recovery has been had upon grounds not alleged in the complaint, it should be made in season. After judgment, it is too late for the unsuccessful party to avail himself of it: *Updike* v. *Abel*, 60 Barb.

New Trial for Want of Proof.—Under the system of practice established by the Code, in order to entitle a defendant to a new trial, on the ground that the plaintiff has not proved the case made by his complaint, it must appear that the cause of action is unproved in its entire scope: *Id.*

RAILROAD. See *Negligence.*

Unnecessary Injury to Lands—Suit for Damages.—The charter of a railroad company provided, that "in all cases where the owners of land or stone necessary for the use and construction of said road shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor, it shall be lawful for the corporation, by their president or any superintendent, agent, or engineer employed by them, to enter upon and take possession and use the same, avoiding in all cases unnecessary damage or injury to the owners or proprietors;" and the charter then provided the mode of the assessment and payment of the damages to the landowner. *Held*, that the damages to be assessed and paid in the mode prescribed by the charter were those resulting from a construction of the road with care, skill, and prudence, not only as to the safety of persons and property passing over the road, but also as to the protection and safety of the property-holder; and that if by reason of any want of care, skill, or prudence for the protection and safety of the landowner, his property was unnecessarily damaged in the construction or repairing of the road, he might recover therefor in an action for damages as at common law: *Terre Haute and Indianapolis R. R. Co.* v. *McKinley*, 33 Ind.

SALE.

Stoppage in transitu.—A. shipped from Chicago a quantity of wheat, consigned, according to bill of lading in duplicate taken by him, to B., at Indianapolis, *on account of A.*, who had contracted it to B., but it was not to be his till paid for. A. drew at sight, on the date of the shipment, for the price of the wheat, attaching to the draft one copy of the bill of lading endorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. During the forenoon of the day after the shipment, while the wheat was in transit, C. purchased the wheat of B., at Indianapolis, and paid for it, taking from him at the time a bill of lading for the wheat, issued by a railroad company at Indianapolis, on that day, to B., on account of C., who supposed the wheat had then arrived at Indianapolis. The shipping list had been received, but the wheat did not arrive till the night of the following day. C. had no notice of any right of A. to the wheat. Said draft reached Indianapolis at about the hour that B. sold the wheat to C. An attempt was immediately made to present the draft, but B., the drawee, who was insolvent and failed that day, could not be found. In the afternoon, the Indianapolis bank notified the carrier, said railroad company, to hold the wheat for the consignor; and at a later hour on the same day, a similar notice was given at the express instance of said consignor, and the wheat was held accordingly. *Held*, in an action of replevin by C., that he had no right to the possession of the wheat: *Pattison* v. *Culton et al.*, 33 Ind.

SET-OFF. See *Decedent's Estate.*

SHERIFF'S SALE.

Execution.—Upon a *venditioni exponas*, the sheriff cannot levy upon and sell lands not previously seized, and his sale will convey no title: *Maupin et al.* v. *Emmons et al.*, 47 Mo.

Statute of Limitations.—Land was sold by the sheriff, there being no special terms of sale; the purchaser failed to comply; it was again sold for a less sum: the Statute of Limitations began to run from the failure to comply and not from the second sale: *Funk* v. *Smith*, 66 Pa.

The legal inference of a promise to pay was from the bid, the failure to pay was the breach, from which the cause of action arose, and the difference between the sales was evidence as to the measure of damages: *Id.*

This was not the result of an alternative contract to pay damages in lieu of the bid, but an election of the sheriff to put up the property again and to sue for damages: *Id.*

The postponement of the second sale is the act of the sheriff or the party who directs him, for which the bidder is not responsible: *Id.*

SLANDER.

Words Actionable per se—Presumptions as to Criminal Offences.—In slander it is not necessary that *all* the words laid in the declaration should be actionable; it is sufficient if some are: *Klumph* v. *Dunn*, 66 Pa.

All words spoken at the time may be laid and given in evidence as showing the *animus*: *Id.*

Where words impute that a common-law offence had been committed in another state, it need not be affirmatively proved that the offence was indictable there: *Id.*

The presumption is that the common law of a sister state is similar to our own: *Id.*

That words should impute an offence for which there would be liability to prosecution or punishment, is not the criterion of their actionable character: *Id.*

To render words actionable *per se* they must impute an offence of moral turpitude punishable criminally: *Id.*

The law as to the offence in the country in which the words are spoken is to determine their character: *Id.*

Words spoken in Pennsylvania charged the commission of adultery in Georgia. *Held*, that they were actionable *per se*: *Id.*

The position in life and the family of a plaintiff in slander are important circumstances as bearing on the question of damages and are admissible; they need not be laid in the declaration: *Id.*

STAMP. *See Judgment.*

SURETY.

Official Bond.—Where A. was requested to become a surety on a sheriff's official bond by B., a person having no connection with the bond, which was not then present, and A. told B. that the latter might sign the name of the former to the bond, provided that C. and D. first executed it, and, A. never having seen the bond, never having been requested by said sheriff to execute it, and never having had any communication in relation to the bond with said sheriff or any other person, except B., the name of A. was signed by B. to the bond, which was never executed by C. or D.; *Held*, that A. was not bound as a surety: *Bagot* v. *State, ex rel. Dennison*, 33 Ind.

A sheriff's return to an execution, showing the collection of the money thereon, is conclusive upon the sureties on his official bond in a suit on such bond on the relation of the execution-plaintiff for the failure of the officer to pay over such money: *Id.*

Promissory Note—Consideration.—Where a promissory note with surety has been given upon an agreement that the payee shall deliver up to the maker another note for the same amount theretofore executed by the same maker with other surety to the same payee, and the payee fails to so deliver up said other note, there is no consideration to support the new note: *Heeg* v. *Weigand*, 33 Ind.

If such new note be given to indemnify the security on the old note, the new one becomes an additional security in the hands of the payee; and the surety for whose indemnity it has been given, having paid the debt and received said new note from the payee, may recover thereon. against the new surety: *Id.*

TAXATION.

Collector—Suit.—Although an assessment for taxes be erroneous in part, the collector is not personally liable to an action at the suit of a party from whom taxes have been levied: *St. Louis Mutual Life Ins. Co.* v. *Charles*, 47 Mo.

TITLE.

Recording Deeds—Notice.—A purchaser at an execution sale, knowing the fact that a third party is in possession of the land sold, is put upon inquiry as to the title by which such party holds. An unrecorded deed is good as between the parties thereto and all persons having actual notice thereof: *Maupin et al.* v. *Emmons et al.*, 47 Mo.

USURY. See *Corporation.*

Finding as to Interest.—Where, in an action upon a promissory note, the single question to be tried is, whether there was a corrupt and usurious agreement made, upon a loan of money which was the consideration of the note, the *interest* of the parties is a question of fact; and that question having been found by the jury against the defendants, upon conflicting evidence, their finding is conclusive; unless some error was committed, on the trial, by the judge in his rulings or charge to the jury: *Horton* v. *Moot*, 60 Barb.

What are Questions of Fact.—Whether the transaction was a contrivance on the part of the plaintiff, by which he obtained more than seven per cent. for the loan or forbearance of money; whether it was a fraud upon the statute, to cover usury; whether the plaintiff bought the note of the bank at which it was payable; or whether the bank acted as the agent of the plaintiff in committing the fraud;—are not questions of law independent of the facts upon which the propositions are based. And if the jury find, correctly, against the defendants, upon them, the court cannot reverse their findings: *Id.*

VENDOR AND PURCHASER.

Damages for Fraudulent Representations of Vendor.—In an action by a purchaser of land against the vendor, to recover damages for fraudulent representations of the latter, the evidence showed that during

the negotiations the plaintiff informed the defendant that he would not purchase lands held under a tax title, and that the defendant represented that he "had good title, and the best kind of title," to the lands in question; that they had been selected as choice lands, many years before, by one who had great opportunities of locating choice lands; and that such person had conveyed some of them to his brother, and the latter had conveyed them to the defendant. The falsity of the representations was clearly proved, and the judge charged the jury that there was no dispute that the lands were held by the defendant under tax titles; and that if the defendant made the representations proved, knowing that the title was a tax title, it would be a fraud. *Held*, that the charge was correct; and that a verdict having been rendered for the plaintiff, in accordance with it, and upon the weight of evidence, a new trial was improperly granted: *Updyke* v. *Abel*, 60 Barb.

Vendor's Liability to Return Purchase-Money, or Give Possession.—An agreement by parol having been made between the plaintiff and the defendants, for the sale of a dwelling-house by the latter to the former, and the possession thereof, the plaintiff paid the purchase-money. A writing was subsequently executed by the defendants, and delivered, but it did not contain all the agreement. And upon the plaintiff objecting to and returning it, on the grounnd that it did not provide for giving him the possession, the defendants virtually admitted the fact by not denying it, and agreeing to make it all right. *Held*, that the defendants having received the plaintiff's money upon an agreement to give him possession, equity and common justice demanded that they should make him good by returning the money, or giving possession according to the agreement: *Hoag* v. *Owen*, 60 Barb.

Held, also, that the jury having found that the writing was not a conveyance to the plaintiff, he was not bound to reconvey the building to the defendants before bringing an action to recover back the purchase-money he had paid. That it was sufficient for him to demand possession, or a return of the purchase-money: *Id.*

Fraudulent Purchase of Goods—Right of Vendor to rescind—Admixture of Goods—Loss of Identity.—A. & Co., who were insolvent at the time, purchased of the plaintiff a quantity of wool, on credit, with a preconceived design not to pay for it; and a portion of it having been delivered, it was immediately put into the mill of the purchasers, and a part thereof was in process of being manufactured, when A. & Co. made an assignment of all their personal property in trust for the benefit of their creditors, and the defendant, claiming under the assignees, took possession of the wool at the said mill. The plaintiff, claiming the right to rescind the sale on the ground of fraud, demanded a return of the property. *Held*, that the purchase of the wool, by A. & Co., having been fraudulent, the delivery of the property to them gave them no title to it. That the assignment was fraudulent and void as against the plaintiff. That, the assignees not being *bonâ fide* purchasers, their title was no better than that of their assignors. That the defendant was not a *bonâ fide* purchaser, and could claim no protection as such. That the plaintiff had a right to have the original sale rescinded. That the wool had not, by the acts of A. & Co. in mixing the same with other