result in the financial ruin of the owners, the application for an injunction must be sustained by strong and convincing testimony; in other words, a plain case of nuisance, and with it irreparable injury must be established. While the inconveniences and annoyances to the two appellees in this case must be conceded to exist, the facts developed do not authorize an interference by the chancellor, and the judgment below is therefore reversed with directions to dismiss the petition.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
ENGLISH COURTS OF LAW AND EQUITY.[2]
SUPREME COURT OF PENNSYLVANIA.[3]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.

ADMIRALTY.

Salvage—Joinder of actions in rem and in personam—Volunteer Service.—Salvors cannot proceed against a ship and cargo *in rem*, and against the consignees of the cargo *in personam*, in the same libel: *Steamboat Mayflower* v. *Steamboat Sabine*, S. C. U. S., Oct. Term 1879.

An action *in personam* for salvage cannot be maintained against the owner of the property saved unless the service was performed at his request. *Id.*

AGENT. See *Broker.*

ASSIGNMENT. See *Negotiable Instruments.*

ATTORNEY. See *Criminal Law.*

Purchase by, at sale of Client's Property—When sustained.—While purchases at judicial sales in the name of the solicitor for the party whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to such party: *Pacific Railroad Co.* v. *Ketchum*, S. C. U. S., Oct. Term 1879.

BAILMENT.

Pledgor and Pledgee—Goods obtained by Fraud from Pledgee and repledged.—D. & Co. deposited certain goods with the plaintiffs as security

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 11 Otto

[2] Selected from late numbers of the Law Reports.

[3] From A. Wilson Norris, Esq., Reporter; to appear in 90 Penna. St. Reports. From Hon. John H. Stewart, Reporter; to appear in 32 N. J. Eq. Reports.

for an advance; they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods, with a power of sale with them: *Held*, by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them in an action from the defendants who had obtained them bona fide and for a good consideration: *Babcock* v. *Lawson*, Law Rep. 5 Q. B. Div.

Bill of Lading.

Negotiability—Definition of—Transfer of Stolen Bill—Statute—Construction of.—Negotiability is a technical term applied to a contract, and signifying the capability of being transferred by endorsement and delivery, so as to give the endorsee a right to sue in his own name. It does not necessarily include all the incidents attached to the endorsement of bills of exchange and promissory notes, such as the right of a *bona fide* purchaser of a stolen bill to enforce its payment: *Shaw* v. *Merchants' National Bank*, S. C. U. S., Oct. Term 1879.

Statutes making bills of lading negotiable by endorsement and delivery, or in the same manner as bills of exchange and promissory notes, do not put these instruments in all respects on the same footing, and a purchaser of such a bill of lading after it had been stolen, who had reason to believe that his vendor was not the owner, takes no title as against the true owner. *Id.*

Bills and Notes.

Transfer of—Guarantee in place of Endorsement—Rights of Holder.—A guarantee of payment written on the back of a promissory note by the payee is not an endorsement, and the transferee takes subject to the equities between the original parties: *Central Trust Co.* v. *First National Bank of Wyandotte*, S. C. U. S., Oct. Term 1879.

Broker.

Concealment of Facts from Principal—Collusion with Purchaser—Equitable Relief.—A real estate broker employed to find a purchaser for land, is bound to disclose to his principal any facts known to him, material to the transaction, and, if the broker takes part in the negotiation, he is bound to exert his skill for the benefit of his principal: *Young* v. *Hughes*, 32 N. J. Eq.

Purchasers obtaining a contract for the sale of land through a real estate broker who, with their knowledge and in collusion with them, has concealed material facts from his principal, or exerted his skill in the negotiation against his principal, cannot in equity enforce the contract, and such a contract will be set aside: *Id.*

Conflict of Laws. See *Husband and Wife.*

Constitutional Law.

Injury caused by act done under Statutory Authority—Consequential Damages for Property taken for Public use—Evidence as to worthlessness of Property taken.—Where, under the authority conferred by an Act

of Assembly, a bank and stone wall are erected to prevent an overflow of water from a river, damages cannot be recovered for an injury to a fishery occasioned thereby: *Tinicum Fishing Co.* v. *Carter*, 90 Penn. St.

Such damages are merely consequential, and the constitutional provision, that compensation shall be made to the owner of property taken for public use, does not apply to such damages: *Id.*

In a suit for damages for injury to a fishery, to prevent a recovery, it is not necessary to show that the fishery was entirely destroyed, but it is sufficient if it be shown that it was worthless: *Id.*

Taking Private Property for Public use— Wrongful and unauthorized seizure by Officer—Jurisdiction of Court of Claims.—The maxim that the king can do no wrong, has no place in our system of constitutional law, as applicable either to the government or to any of its officers: *Langford* v. *United States*, S. C. U. S., Oct. Term 1879.

Where the seizure of property by an officer of the government is wrongful and unauthorized, and would, as between individuals, amount to a tort, no implied contract to pay on the part of the government is raised such as is necessary to give the Court of Claims jurisdiction: *Id.*

Whether, when the government takes avowedly private property for public use, in a manner to make the taking the act of the government, the just compensation for such property guaranteed by the Constitution can, in the absence of any other provision of law, be recovered in the Court of Claims: *Quere? Id.*

CONTRACT. See *Mortgage.*

Sale of Goods— Offer, till when open—Refusal of Offer, what amounts to—Revocation of Offer, when effective.—The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough, asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs, fixing 40s. per ton, net cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs, on the Monday morning at 9.42, telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day, he sold the warrants, and at 1.25 P. M., telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having, at 1 P. M., found a purchaser for the iron, sent a telegram at 1.34 P. M., to the defendant, stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found, at the trial, that the relation between the parties was that of buyer and seller, not of principal and agent. The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiff's telegram was sent at 9.42 A. M. how prices would range during the day: *Held*, by LUSH, J., that under the circumstances the plaintiff's telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that,

although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable. *Cooke* v. *Oxley*, 3 T. R. 653, discussed; *Byrne & Co.* v. *Leon van Tienhoven & Co.*, 49 L. J. (C. P.) 316, followed: *Stevenson* v. *McLean*, Law Rep. 5 Q. B. Div.

CORPORATION. See *Errors and Appeals.*

COURT.

Improper execution of Process—Power to institute Inquiry.—If a court is incidentally informed, or has reason to believe, that its process has not been properly executed, and that injustice is likely to ensue, it is proper for it, of its own motion, to interfere temporarily so that the matter can be inquired into: *Chamberlain* v. *Larned*, 32 N. J. Eq.

Power to make Rules—Admission of Evidence.—It is within the power of a court to make a rule, to allow an instrument to be admitted in evidence without proof of its execution, unless the opposite party give notice that he requires such proof to be produced: *Reese* v. *Reese*, 90 Penn. St.

CRIMINAL LAW.

Counsel assigned by Court—Fees of—Not payable by County.—Where counsel are assigned by a court to defend a pauper criminal, the county wherein the trial is had is not bound to pay their fees, nor even the expenses incurred in the preparation and course of the trial. One of the incidents of the office of counsel, who is an officer of the court, is to defend such prisoners gratuitously: *Wayne County* v. *Waller et al.*, 90 Penn. St.

At common law no money can be drawn from the public treasury except by virtue of a statute. In Pennsylvania the courts have always proceeded on the safe principle of requiring statutory authority, either in express terms or by necessary implication, for all claims upon the public treasury. If counsel, therefore, make advances on account of the defence of a pauper criminal, they cannot recover such advances from the county: *Id.*

DEBTOR AND CREDITOR. See *Trustee.*

DIVORCE. See *Husband and Wife.*

EQUITY. See *Broker; Estoppel; Mortgage; Pleading.*

Staying Proceedings at Law—Evidence discovered after Judgment.—Evidence newly discovered, relevant and material, which appears not to have been undiscovered through the appellants' laches or negligence, consisting of a letter and also a written agreement in respondents' possession during the trial at law, constitutes ground sufficient for staying proceedings on the judgment obtained at law, and for ordering a retrial: *Cairo and Fulton Railroad Co.* v. *Titus*, 32 N. J. Eq.

ERRORS AND APPEALS.

Decree of Appellate Court—Power of lower Court to enlarge Order of

Restitution.—A court below cannot engraft on a decree of the Supreme Court an order of restitution not contained in said decree. If restitution be ordered it is a constituent part of the judgment, but if not found therein it cannot be made a part thereof by the lower court, whose duty is limited to enforcing the decree without any enlargement or change in its legal effect: *Hughes's Appeal*, 90 Penn. St.

Charge of Court.—Although parts of a charge, when taken separately, may seem to be erroneous and indicate a leaning to one side or the other, there is yet no error, if taken as a whole, the questions at issue are fairly left to the jury: *Reese* v. *Reese*, 90 Penn. St.

Decree by Consent—Jurisdiction—Fraudulent consent by Solicitor—Remedy.—Under sect. 692, Rev. Stat., an appeal from a decree rendered by consent must be received and decided, but the court will not consider any errors which were waived by the consent: *Pacific Railroad Co. of Mo.* v. *Ketchum*, S. C. U. S., October Term 1879.

The remedy of a stockholder for the fraudulent consent of the solicitor or officers of a corporation to a decree, is by an appropriate proceeding in the court where the consent was received and acted upon and not by an appeal from the decree: *Id.*

ESTOPPEL.

In pais—Ground for Injunction against Proceeding at Law—What facts constitute.—Estoppels *in pais*, such as have always been known to equity, afford a foundation for a court of equity to enjoin proceedings at law involving such estoppel: *Society for Establishing Useful Manufactures* v. *Lehigh Valley Railroad Co.*, 32 N. J. Eq.

It is not every estoppel *in pais* which is available at law as well as in equity, that will have this effect; but when the estoppel grows out of transactions varied in their character and occurring at intervals through a long period of time, which may be available only on equitable terms, it will afford a foundation for equitable intervention: *Id.*

Where a canal company had, for over twenty years, been in the undisputed possession of water, which, before that period, had been in litigation with a riparian owner who knew that the canal company was about to lease its works, which were materially dependent on such water, and such riparian owner took no measures to revive the old litigation, or to give notice of such claims before the lease was given: *Held*, that ground was laid for the claim of an equitable estoppel in behalf of the lessee, and that he had a sufficient standing in a court of equity to enjoin suits at law calling in question the right to such water: *Id.*

EVIDENCE. See *Constitutional Law; Court.*

Unsupported Testimony of Interested Party.—The Act of 1869 having made parties to an action competent witnesses for all purposes, the evidence of a defendant in his own behalf, although unsupported and positively contradicted by the plaintiff, must be submitted to the jury. *Prowattain* v. *Tindall*, 30 P. F Smith 295, followed: *Shaffer* v. *Clark*, 90 Penn. St.

Contradiction of Written Evidence by Parol—When and to what extent allowable—Suit by Administrator—Parties incompetent as Witnesses.—It is well settled, except in the case of negotiable paper, that parol evi

dence is admissible to contradict, vary or even avoid a written instrument, where it is proved that but for the oral stipulation it would not have been executed: *Hoopes* v. *Beale*, 90 Penn. St.

Where the evidence of what occurred at the execution of the instrument is clear and precise, there is no limitation to the power to modify, explain or reform written agreements by parol evidence: *Id.*

A. executed a bond and mortgage to B., who assigned it to C. The latter died, and in a suit brought by B. to the use of C.'s administrators: *Held*, that parol evidence was admissible to prove that the bond and mortgage were executed with the understanding that there would be no personal liability. *Held, further*, that the suit being in reality by an administrator, A. was incompetent as a witness: *Id.*

Expert—Testimony as to Handwriting,—Where an expert acquires his knowledge of the handwriting of a person by simply observing him write several times, and this for the purpose of testifying, he is not competent to give an opinion as to the genuineness of that person's signature: *Reese* v. *Reese*, 90 Penn. St.

Where it is alleged and denied that the body and signature of an instrument are in the same handwriting, an expert may be asked whether, in his opinion, the two parts were written by the same person: *Id.*

EXPERT. See *Evidence.*

FRAUD. See *Broker; Mortgage.*

GUARANTY. See *Bills and Notes.*

HUSBAND AND WIFE.

Marriage, Dissolution of—Lunatic Petitioner—Committee.—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the estate of the lunatic: *Baker* v. *Baker*, Law Rep. 5 Prob. Div.

Marriage—Divorce in Foreign Country—Bigamy.—Two English persons married in England. The husband afterwards went to Kansas, in the United States, and, after an interval of a year, presented a petition and obtained a divorce by reason of his wife's desertion. He then married again. The wife had received no notice of the petition. *Held*, that, his domicile at the time of the divorce was English; and that, therefore, the divorce was null and void, and he had committed bigamy. *Quære*, whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile: *Briggs* v. *Briggs*, Law Rep. 5 Prob. Div.

Marriage in England—Divorce in Scotland—Validity.—The English Divorce Court will recognise as valid the decree of a Scotch court dissolving the marriage of domiciled Scotch persons though the marriage was solemnized in England and the woman was English prior to her marriage. *Semble*, in some cases the English Divorce Court might recognise as valid the decrees of a foreign court dissolving the marriages of English persons: *Harvey* v. *Farnie*, Law Rep. 5 Prob. Div.

INSURANCE.

Promise in Application—Violation of.—In an application for a life insurance policy, the applicant declared, "that he does not now, nor will he, practise any pernicious habit, which obviously tends to the shortening of life." The policy issued in pursuance of said application contained this provision: "If any of the statements or declarations made in the application of this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case, this policy shall be null and void." At the time of making the application, the applicant was of correct and temperate habits. Some years after the issuing of the policy, he became addicted to the use of intoxicating drinks, from the immoderate use of which he was attacked with delirium tremens, from the effects of which he died. *Held*, that, in the absence of any clause in the policy avoiding it, in case the assured should practise any such habit, and of any covenant or warranty on his part that he would not do so, his mere declaration to that effect in the application was not sufficient to avoid the policy: *Knecht* v. *Mutual Life Insurance Co. of New York*, 90 Penn. St.

General Average—Expenses of warehousing and reshipping Cargo of Pilotage, and other Charges on Vessel leaving Port.—Where a vessel goes into port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average. So *held*, by the Court of Appeal affirming the judgment of the majority of the Queen's Bench Division: *Atwood* v. *Sellar*, Law Rep. 5 Q. B. Div.

INTEREST. See *Usury*.

JUDICIAL SALE.

Misconduct of Sheriff—Adjournment—Sale in Office—Setting aside.—When a sheriff, without instructions, adjourned the sale of valuable property from week to week in his office, and then sold without any further advertisement, it appearing that the owner of the property sold had been misled by such course, and was unaware of the sale. *Held*, that, it was proper to set such sale aside upon equitable terms: *Chamberlain* v. *Larned*, 32 N. J. Eq.

LEASE. See *Railroad*.

LIEN. See *Municipal Corporation*.

MINE.

Winning—Apportionment—Mixture of Goods.—By a deed of grant and license the licensee was allowed to win and work all and every or any of the coal mines, seam and seams of coal, within certain lands, and in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; and it was provided that, after repayment of all expenses of winning the said colliery, coal mines or coal mine, seam or seams of coal, he should pay such royalty as should from time to time be awarded by two arbitrators to be named by the parties respectively. There were three seams of coal under the land. The licensee reached one of them by a driftway from an adjoining colliery and

worked the coal. He afterwards, by similar means, reached and worked another of them. The third was also reached, but was abandoned as worthless. *Held*, that, the coal was won according to the meaning of the deed so soon as the first seam was reached through the driftway so that it could be worked, and that the deed did not contemplate a distinct winning in respect of each seam; and that, therefore, expenses incurred after the first seam had been reached could not be treated as expenses of winning: *Lord Rokeby* v. *Elliot*, Law Rep. 13 Chan. Div.

The licensee mixed the coals gotten under the license with those gotten from his own colliery and sold them together. He alleged that the coals gotten under the license were inferior in value to the other coals. *Held*, that, as they had been mixed by the licensee's own act, he was not entitled to an inquiry as to how much the selling price of the coals was diminished by the mixture of the coals gotten under the license: *Id.*

MIXTURE OF GOODS. See *Mine.*

MORTGAGE.

Assumption of Payment by Purchaser—Personal Liability to Mortgagee —Contract—Consideration.—Although the clause, in a deed of conveyance, "under and subject" to a mortgage is a covenant of indemnity only as between grantor and grantee for the protection of the former, yet such grantee may so contract with his grantor as to make himself personally liable to the mortgagee, for the amount of the mortgage, even though his grantor was not so liable: *Merriman* v. *Moore*, 90 Penn. St.

A. conveyed land to B., "under and subject" to the payment of a mortgage to C. The deed to A. contained no "under and subject" clause. In a suit by C. against B., to recover the amount of the mortgage, C. offered to prove that when B. took the conveyance from A., he expressly agreed that he would assume the payment of the mortgage, and that the mortgage formed part of the consideration-money. *Held*, that such evidence should have been admitted. *Held*, *further*, that although A. was not liable, yet his contract was not without consideration, inasmuch as the price of the land was the consideration: *Id.*

It is a rudimentary principle that a party may sue on a promise made on a sufficient consideration, for his use and benefit, though it be made to another and not himself: *Id.*

Award of Damages to Mortgagor for Land taken for Railroad—Equitable right of Mortgagee.—Under the charter of the New Egypt and Farmingdale Railroad Company (Pamph. L. 1869, p. 471), a portion of certain mortgaged lands were condemned for the company's use, in proceedings of which the company had given notice to the mortgagors only. *Held*, that the mortgagee was entitled in equity to have the sum so awarded for the land and damages, applied towards the payment of his debt, and the rest of the mortgaged premises, subject to the rights of the railroad company, sold for the payment of the balance: *Bright* v. *Platt*, 32 N. J. Eq.

Given for Accommodation of Mortgagee—Misrepresentation—Bonâ fide Purchaser.—That a mortgage was given for the temporary accommodation of the mortgagee; that he intended to use it only as collateral security, and that he falsely represented himself then to be solvent, are no defence to such mortgage in the hands of a *bonâ fide* assignee, for

value, without notice, who holds it under an absolute assignment: *Jacobsen* v. *Dodd*, 32 N. J. Eq.

MUNICIPAL CORPORATION.

Taxes—Priority of Lien over Mortgage.—Although a municipal charter did not expressly declare that taxes on lands within the city limits should be paramount to any lien thereon, yet taxes assessed subsequently to the making and recording of a mortgage on such lands, were held to be a prior lien, because such lands were, by the charter, to be assessed at their full and fair value; and mortgages thereon were not taxable in the hands of residents of this state; and a mortgagee or any person interested might redeem such premises after a tax sale; and that, notwithstanding the charter required the tax-sale purchaser to give notice to the owner, after such purchase, and contained no express direction as to such notice being given to the mortgagee: *Mayor and City of Paterson* v. *O'Neill*, 32 N. J. Eq.

NEGLIGENCE. See *Constitutional Law.*

Railroad—Fire started by Sparks—Proximate Cause—Submission to Jury.—Sparks were thrown from an engine of a railroad company, to a point on land adjoining the plaintiff's about three hundred feet from a lumber pile, belonging to the plaintiff. The sparks set fire to combustible materials, consisting of leaves, briers, brush, stumps and logs, burning the same in its pathway, until it reached the plaintiff's lumber. The weather was dry and a high wind was blowing in the direction of the property destroyed. The fire reached the lumber about two hours after it started, and could not be extinguished by any effort. In a suit for the loss, there was evidence on the part of the defendant company tending to another theory as to the origin and extent of the fire. *Held*, that it was properly left to the jury to determine whether the negligence of defendant was the proximate or remote cause of the injury: *Pennsylvania Railroad Co.* v. *Hope*, 30 P. F. Smith 373, followed: *Lehigh Valley Railroad Co.* v. *McKeen*, 90 Penn. St.

There was evidence on the part of plaintiff, that the sparks emitted from the engine on the day of the fire were of unusual size. The defendant gave evidence to show, that the engine was supplied with the most approved spark-arrester, and asked the court to charge that there was no proof of any want of care in the working of the engine, which the court refused. *Held*, that the question of negligence was one of fact and properly left to the jury: *Id.*

NEGOTIABLE INSTRUMENTS. See *Bills of Lading.*

Certificate for work done for Municipality—Blank endorsement—Assignment—Pledge.—A certificate by the proper officer of the District of Columbia that an account of work done for the District was correct and that a certain amount was due thereon, is not a negotiable instrument, and if endorsed in blank and pledged by the person in whose favor it is issued, a subsequent transferree takes it subject to all the equities of the actual owner: *Cowdrey* v. *Vandenburgh*, S. C. U. S., October Term 1879.

Semble. If the pledgee had written an assignment above the blank endorsement, a subsequent purchaser for value without notice would have taken it free from such equities: *Id.*

PATENT.

Abandonment—Delay in prosecuting Application—Effect of Commissioner's Decision—Naming Witnesses in Answer—Act of Congress—Construction of.—If an inventor after his application for a patent is rejected, delays, without cause, for many years, to renew his application or to appeal, and suffers his invention to go into common use, he is presumed to have abandoned it: *Woodbury Patent Planing Machine Co* v. *Keith*, S. C. U. S, Oct. Term 1879.

Smith v. *Dental Vulcanite Co*, 93 U. S. 486, distinguished: *Id.*

The decision of the Commissioner of Patents upon a question of abandonment, is not conclusive in a subsequent suit for infringement: *Id.*

Under sect. 4920, Rev. Stat., a defendant is only required to give in his answer the names of those who had invented or used the anticipating machine and not the names of those who are to testify of its invention or use: *Id.*

PLEADING.

Bill in Equity— When not demurrable.—A bill is not demurrable if it contains equitable merits, although it be admitted that some of the other circumstances stated cannot be of avail: *Reading* v. *Stover*, 32 N. J. Eq.

PLEDGE. See *Bailment.*

RAILROAD. See *Mortgage; Negligence.*

Power to Lease Road—Absence of express Authority in Charter—Power not implied from Authority to Contract with other Companies.—A lease by a railroad company of all its road, rolling-stock and franchises for which there is no express authority given in its charter is *ultra vires* and void: *Thomas* v. *West Jersey Railroad*, S. C. U. S., Oct. Term 1879.

The ordinary clause in the charter authorizing such corporations to contract with other transportation companies, for the mutual transfer of goods and passengers over each other's road, is no authority to lease its road and franchises: *Id.*

Where upon a lease of this kind, for twenty years, the lessors have resumed possession at the end of five years, and the accounts for that period have been adjusted and paid, a condition in the lease to pay the value of the unexpired term, is void, and the case does not come within the principle that executed contracts which were originally *ultra vires*, shall stand good for the protection of rights acquired under a completed transaction: *Id.*

REMOVAL OF CAUSES.

Citizens of different States—Real Controversy—Position of Parties in the Pleadings—Jurisdiction by Consent.—Where the real controversy is between citizens of different states, the United States courts will take jurisdiction, without regard to the position which the parties occupy as plaintiffs or defendants: *Pacific Railroad of Mo.* v. *Ketchum*, S. C. U. S., Oct. Term 1879.

Consent cannot give jurisdiction in such cases, but it may bind the parties and waive previous errors if when the court acts jurisdiction has been obtained: *Id.*

SALE. See *Contract.*

Auction—Conditions of Sale— Warranty.—The plaintiff bought a horse

by public auction at a repository, warranted to be a good worker subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before five o'clock of the day after the sale: shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time: *Held*, on demurrer in an action on the warranty, that the plaintiff's only remedy was under the condition, and that he could not maintain the action: *Hinchcliffe* v. *Barwick*, Law Rep. 5 Exch. Div.

SALVAGE. See *Admiralty*.

SHIPPING. See *Insurance*.

Charter-party—To deliver at a given Port "or so near thereto as the Ship could safely get"—Custom inconsistent with the Contract.—By a charter-party the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses: *Held*, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses: *Hayton* v. *Irwin*, Law Rep. 5 C. P. Div.

SHERIFF. See *Judicial Sale*.

TAXATION. See *Municipal Corporation*.

Public Charity—Institutions in which preference is given to Members of a particular Sect—Exemption.—Testatrix by her will provided for the establishment of an asylum, whose object should be the maintenance and education of white female orphan children of not less than four years or more than eight: first, who shall have been baptised in the Protestant Episcopal Church, in the city of Philadelphia: second, the same class of children baptised in said church, in the state of Pennsylvania; third, all other white female orphan children, between the said years, without respect to any other description or qualification whatever, except that at all times, and in every case, the orphan children of clergymen of the Protestant Episcopal Church shall have the preference. The will contained further directions, that the form of worship and instruction should be that observed and taught in the Episcopal Church, and appointed the bishop of said church and his successors the perpetual visitor. *Held*, that, the asylum is a "purely public charity," within the meaning of section 1, article 9 of the constitution, which provides, that the legislature may exempt from taxation institutions of purely public charity: *Burd Orphan Asylum* v. *The School District of Upper Darby*, 90 Penn. St.

Trust and Trustee.

Person "acting in a fiduciary capacity"—Manager of Estate.—The Debtor's Act 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, is intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive: *Marris* v. *Ingram*, Law Rep. 13 Chan. Div.

Barrett v. *Hammond*, 10 Chan. Div. 285, not followed: *Id.*

A "person acting in a fiduciary capacity," means a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such other person is or is not the plaintiff, or one of the plaintiffs, in the action in which the order for payment has been made: *Id.*

A son in the course of management of one of his father's farms sold part of the farming stock, and received the proceeds. Upon the father's death an action was brought by parties interested in his estate against the son for payment of the moneys received by him, and for accounts. The son having failed to comply with an order made in the action for payment of a sum of money into court. *Held*, that, he was a "person acting in a fiduciary capacity," within the Debtor's Act 1869; and accordingly, the court not being satisfied that he had not the means of payment, leave was given to the plaintiffs to issue a writ of attachment against him for non-payment: *Id.*

Undue Influence.

What not.—That a testator's wife urged upon him the propriety of leaving his property to her, does not constitute undue influence to vitiate the will: *Hughes* v. *Murtha*, 32 N. J. Eq.

Usury.

Payment for Extension of Time.—The payment of usurious interest, after a debt becomes due, is not a valid consideration for an agreement to give time: *Hartman* v. *Danner*, 24 P. F. Smith, 36 followed; *Shaffer* v. *Clark*, 90 Penn. St.

United States Courts. See *Constitutional Law.*

Will.

Mental Capacity—Delusions—Burden of Proof.—A man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be subject to delusions so as to be unfit to make a will. But if the delusions under which he labors are such that they could not reasonably be supposed to have affected the dispositions made by his will, the will would be valid. *Banks* v. *Goodfellow*, Law Rep. 5 Q. B. 549, followed: *Smee* v. *Smee*, Law Rep. 5 Probate Div.

The burden of proving capacity to make a will rests upon those who propound the will, and, *à fortiori*, when it appears that the testator was subject to delusions: *Id.*

Interlineations—Attestation by Initials.—The initials of a testatrix and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid: *In the Goods of Blewitt*, Law Rep. 5 Probate Div.