S241825

IN THE SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES,
Plaintiff and Appellant,

v.

LAMBIRTH TRUCKING COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NO. C070770

EXHIBITS TO MOTION FOR JUDICIAL NOTICE [VOLUME 1 OF 2 • Pages 1-270]

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PACIFIC GAS AND ELECTRIC COMPANY

SCHOLES V. LAMBIRTH TRUCKING CO.
CASE NO. S241825

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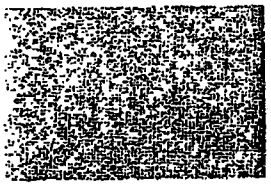

LEGISLATIVE
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DECLARATION OF FILOMENA M. YEROSHEK

I, Filomena M. Yeroshek, declare:

I am an attorney licensed to practice before the courts of the State of California, State Bar No. 125625, and am employed by Legislative Intent Service, Inc. a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the 1872 enactment of Political Code section 3344.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on 1872 enactment of Political Code section 3344. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the 1872 enactment of the code section.

1872 POLITICAL CODE SECTION 3344:

1. Procedural history of the 1872 California Political Code, prepared by Legislative Intent Service;
2. Report of the Joint Committee of the Political Code, 1871-72;
x 3. Excerpt regarding former Political Code section 3344 from the Revised Laws of the State of California, Political Code, January 1872;
x 4. Excerpt regarding former Political Code section 3344 from The Political Code of the State of California, annotated by Haymond and Burch, Volumes I and II, September 1872;
x 5. Excerpt regarding New York Political Code section 763 from The Political Code of the State of New York, reported complete by the Commissioners of the Code, 1859;
6. California Code Commentary, by Charles Lindley, (1872) a summary prepared by Legislative Intent Service, focusing on the Political Code;
x 7. Excerpt regarding Penal Code section 384 from The Penal

Code of California, 1872.

x Exhibits preceded by an "x" are excerpted. The original exhibit is lengthy and may not contain any further discussion relevant to your concern. The entire exhibit, or further portions of it, will be made available on your request.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 8th day of September, 2008 at Woodland, California.

Filomena M. Yeroshek

FILOMENA M. YEROSHEK

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THE PROCEDURAL HISTORY OF THE 1872 CALIFORNIA POLITICAL CODE

(Prepared by Legislative Intent Service)

DOCUMENTS AVAILABLE UPON REQUEST

1. Excerpt of the preface and amendments from the "rejected edition" of the Revised Laws of the State of California, Political Code, January 1872;
2. Excerpt of the preface from the Political Code of the State of California, annotated by Haymond and Burch, Volume I, September 1872;
3. Report of the Joint Committee on the Revision of the Political Code, 1871-72;
4. Excerpt regarding Senate Bill 375 from the Journal of the Senate, 1871-72;
5. Excerpt regarding Senate Bill 375 from the Journal of the Assembly, 1871-72;
6. News articles regarding the Revision Commission from the Sacramento Daily Union, November 13, 1871 and January 1, 1872;
7. News articles regarding Senate Bill 375 from the Sacramento Daily Union, March 8, 9, and 13, 1872.

The California Political Code was adopted in 1872 following the enactment of Senate Bill 375, "An Act to Establish a Political Code." (See Exhibit #4)

The Political Code was prepared by the California Code Commission, also known as the Revision Commission, which began its work on May 4, 1870. The Commission completed the Political Code by January of 1872. The California Political Code was modeled after the New York Political Code.

The Political Code was reviewed by the Advisory Committee on the Revision of the Laws and the Joint Committee on Revision of the Political Code. (See Exhibits #3 and #7) The Advisory Committee recommended the adoption of the Code after carefully examining it and comparing it section by section with California's then existing laws and the laws of the most populous states. (See Exhibit #7)

The Joint Committee on Revision also, after careful examination,

recommended the adoption of the Political Code.
The California Political Code was introduced in bill form on March 7, 1872 by former Senator Irwin as Senate Bill 375, "An Act to Establish a Political Code." (See Exhibit #4)

Senate Bill 375 was introduced in the Senate, Senator Irwin lengthy remarks were reproduced in the Sacramento Union the following day.

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REPORT

OF

THE JOINT COMMITTEE

ON THE

POLITICAL CODE.

Note.—Submitted to 19th. (1871-2) session of legislature and published in Appendix to Journals of Senate and Assembly, 19th session, vol. 3, as no. 17.

T. A. SPRINGER.....STATE PRINTER.

REPORT.

TO THE HONORABLE THE LEGISLATURE OF THE STATE OF CALIFORNIA:

The Joint Committee on Revision appointed by the Legislature to examine the Political Code prepared by the Revision Commission make the following report:

Your committee met on the day of January and have held sessions almost daily since. During this time it has given to the Code a careful examination, reading it line by line, and comparing it with the statutes of this State, and when necessary with the laws of other States. This Code makes an octavo volume of seven hundred pages, the whole of which would be comprised within two hundred and fifty pages of Hittell's Digest. It is divided into five Parts as follows: Part I. Of the sovereignty and people of the State, and of the political rights and duties of all persons subject to its jurisdiction; II. Of the chief political divisions, seat of government, and legal distances of the State; III. Of the Government of the State; IV. Of the Government of Counties, Cities, and Towns; V. Of the definition and sources of law, the common law, the publication and effect of the Codes, and the express repeal of statutes.

PART I

Is divided into three short Titles, occupying in all six pages and a half. It provides that the sovereignty and jurisdiction of the State extend to all places within its limits; gives the legislative consent to the purchase or condemnation by the United States of lands for governmental purposes (following our statutes); prescribes the rights of the people as to holding office, etc. This part is but preliminary, containing a few plain, general rules upon the subjects included within it, not of any great importance either way, except so far as they give the legislative consent to the purchase or condemnation of property by the Federal Government.

PART II

Commences on page thirty-five, and gives the political divisions of the State, counties, Senatorial, Judicial Districts, etc., the seat of Government and legal distances in the State, following existing laws.

PART III

Contains nine titles, as follows: Title I. Public officers; II. Elections; III. Education; IV. Militia; V. Public institutions; VI. Public ways; VII. General police of the State; VIII. Property of the State; IX. Revenue of the State. Title I is divided into seven Chapters. The first gives the classification of public officers. Chapter II relates to the Legislative Department, and is divided into twelve articles, as follows: Article I. Number, designation, and term of office and election of members of the Legislature; II. Meeting and organization of the Legislature; III. Number, designation, election, and appointment of officers and employés of the Legislature; IV. Powers and duties of officers and employés of the Legislature; V. Compensation of members, officers, and employés of the Legislature; VI. Contesting elections for members of the Legislature; VII. Contesting elections for Governor or Lieutenant Governor; VIII. Attendance and examination of witnesses before the Legislature and committees thereof; IX. Enactment of statutes; X. Promulgation of statutes; XI. Operation of statutes; XII. Public reports.

These articles include all the various provisions of law relative to the subject matter thereof. These statutes have been gathered together, pruned of redundant matter, some new sections added on minor points, and the whole systematically arranged. The nature of the additions may be well illustrated by referring to section three hundred and twelve, and the reasons that led to its introduction. The section is as follows:

SEC. 312. If on the day the Governor desires to return a bill without his approval and with his objections thereto to the House in which it originated that House has adjourned for the day (but not for the session), he may deliver the bill with his message to the presiding officer, Secretary, Clerk, or any member of such House, and such delivery is as effective as though returned in open session, if the Governor on the first day the House is again in session by message notifies it of such delivery, and of the time when and the person to whom such delivery was made.

In Harpending vs. Haight, April term, eighteen hundred and seventy, which was a case founded on the following facts: a bill originated in the Senate providing for the opening of New Montgomery street, and had passed both branches of the Legislature, and was transmitted to the Governor; on the last day allowed by law for its return the Governor attempted to return the bill with a veto message by his Private Secretary, but when the Secretary reached the Senate Chamber the Senate had adjourned for the day; after the adjournment of the Legislature the Governor, claiming that the return of the bill had been prevented by the adjournment of the Senate, and that the bill had not become a law, refused to cause the Secretary of State to certify it as such; whereupon Harpending applied to the Supreme Court for a mandate compelling the Governor to cause the certificate to be made. Upon this application the Court held that the bill had become a law, and the certificate must be made. In the opinion of the Court it is said that the Governor might have returned the bill to any officer, member, or attaché of the Senate, and such is the law of this State to-day. It is obvious that the Governor might, by collusion with a member or officer of the Senate, defeat any bill. He could return privately to a Senator or officer, and though

in contemplation of law it would be in custody of the Senate, yet the Senate might never know that fact; hence the Commissioners have framed the section quoted, requiring the Governor to notify the body in which the bill originated of the mode and manner of its return, in which event the body could control the bill if desirable. This illustration fairly presents the character of the changes made in this part of the work. Instead of using the word "change" in this connection it would be more appropriate to say that omissions have been supplied.

EXECUTIVE OFFICERS.

Chapter III deals with executive officers, and is divided into nineteen articles. This Chapter is a revision of the existing laws of the State. The provisions of law relative to each officer have been collected from the body of the statutes, and plainly and concisely stated. If any one interested in the matter will take the pains to compare either article with the laws as they now stand, the merit of the work will be apparent.

Chapter VII is divided into five articles, as follows: Article I. Clerk of the Supreme Court; II. Reporters of the Supreme Court; III. Notaries Public; IV. Commissioners of Deeds; V. Other officers. Premising that the duties of Notaries in both instances are fixed by sections preceding, we insert, for the purpose of showing the character of the revision, a section from Article III of Chapter VI of the Code and the section as it now stands upon the statute book:

Section 801 of the Political Code.

SEC. 801. For the official misconduct or neglect of a Notary Public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained.

Section 13 of the Act of April 25, 1862 (Statutes 1862, p. 443).

SEC. 13. For any misconduct or neglect of duty in any of the cases in which any Notary Public, appointed under the authority of the State, is authorized to act, either by the law of this State, or by any other State, Government, or country, or by the law of nations, or by commercial usage, he shall be liable on his official bond, to the parties injured thereby, for all the damages sustained.

The penal clause of section thirteen has been carried into the Penal Code. A comparison of other sections in this Chapter with the Chapters from which they have been drawn, will show that the comparison above made is not an unfair one.

Chapter VII is divided into twelve Articles, as follows: Article I. Disqualifications; II. Restrictions upon the residence of officers; III. Powers of deputies; IV. Appointment and duration of term; V. Nominations and commissions; VI. Oath of office; VII. Prohibitions applicable to certain officers; VIII. Salaries, when title is contested; IX. Bonds of officers; X. Resignations, vacancies, and the mode of supplying them; XI. Proceedings to compel delivery of books and papers; XII. Miscellaneous provisions. The remarks relative to the two preceding Chapters apply with equal force to this.

In relation to portions of this Title, Controller James J. Green, under date of January sixteenth, writes to the Commission as follows:

"I have carefully examined the Political Code prepared, so far as it relates to the duties of the office of Controller. It states the law clearly and concisely, and receives my hearty approval. I trust the Legislature

will adopt the same. I would also suggest that it would be well to put the provisions relating to State officers in force at once."

OF ELECTIONS.

Title II, treating of elections, has been before the public for a long time and has met with universal approval. Its provisions are plain and simple, and although it is much broader in its scope than the present law, it is compressed within less than half the space.

Your committee believe that its provisions will tend to the purity of the elective franchise, and will prove of lasting benefit to the State.

Title III is devoted to

EDUCATION,

It is divided into three Chapters: Chapter I. University of California; II. State Normal School; III. Public Schools. This title is a strict revision of the present laws upon the same subjects, rearranged and condensed most materially. Professor Bolander and ex-Superintendent Swett have given this portion of the work a close examination, and have expressed the most favorable opinions as to the manner in which it has been done.

Title IV,

STATE MILITIA,

Embodies in the main provisions of existing laws. It is divided into five Chapters. Of this Title Adjutant General Foote, in a note addressed to the Commissioners, under date of January eighteenth, says:

"I have received a copy of the Political Code containing the militia law as codified, and have examined it with care. In point of arrangement it seems to me complete. I have also compared the militia law of the statutes with the codified law, and find that while the provisions of the statutes have been carefully preserved, much verbiage has been omitted, things that were obscure have been made plain, and some seeming conflicts have been harmonized. Great credit is certainly due the Commission for the manner in which this labor has been performed."

Title V, on

PUBLIC INSTITUTIONS,

Is divided into five Chapters, containing a logical arrangement of existing laws.

Title VI,

OF PUBLIC WAYS,

Is divided into seven Chapters, including substantially our statutes upon the various subjects, with some few new provisions to supply omissions, save Chapters II and III. In relation to the former the Commissioners say: "Roads and highways presented another subject of difficulty. Not less than one hundred and twenty-five Acts concerning roads and highways have been placed upon the statute books. We have prepared a general law, and inserted it as a Chapter, under Title VI, of Part III. It is doubtful whether the condition of the State admits to-day of a general road law; if it does, the policy of enacting one is not a debatable question. In order that a difference of opinion on this question may not

jeopardize the adoption of this Code we have prepared an alternate Chapter, continuing in force the existing laws."

Your committee have deemed it advisable to report the road law as part of the Code, and have amended it, with the concurrence of the Commissioners, in several particulars; and a provision has been inserted making it applicable only to such counties as have no special road law. It does not affect any county to which any existing law is made applicable by name, but such counties may at any time in the future by a repeal of the laws applicable to them come under the provisions of the Code.

Chapter I of this Title covers fifty pages, and is divided into eleven Articles, as follows:

Article I. General Provisions respecting Public Waters; II. Navigation; III. Floating lumber; IV. Wrecks and wrecked property; V. Pilots and Pilot Commissioners; VI. Pilot Regulations for San Francisco, Benicia, and Mare Island; VII. Pilot Regulations for Humboldt Bay and Bar; VIII. Port Wardens; IX. San Francisco Harbor and State Harbor Commissioners; X. Harbor Commissioners for Port of Eureka; XI. Sailors and sailor boarding houses. The titles of the Articles indicate the matter contained and the laws that have been taken into this Chapter.

Title VII,

OF THE POLICE OF THE STATE,

Is divided into fifteen Chapters, as follows: Chapter I. Immigration; II. Preservation of the public health; III. Registry of births, marriages, and deaths; IV. Dissection; V. Cemeteries and sepulture; VI. Lost and unclaimed property; VII. Marks and brands; VIII. Weights and measures; IX. Labor and materials on public buildings; X. Hours of labor; XI. Time; XII. Money of account; XIII. Auctions; XIV. Fires and firemen; XV. Licenses. Of these, with the exception of Chapters III and IX, it may also be said that it embodies substantially the present laws, carefully revised and arranged.

Title VIII,

OF THE PROPERTY OF THE STATE,

Is divided into three chapters, as follows: I. Public lands; II. Yosemite Valley and the Mariposa Big Tree Grove; III. The State Burying Ground. Chapter II, the principal one of the Title, is a close revision and arrangement of existing laws.

The last Title of this Part is Title IX,

OF REVENUE.

The Commission have adopted a plan which embodies some of the suggestions of the Board of Equalization, and those of Controllers Watt and Green, and other gentlemen who have given the matter much attention. Of this the Commissioners say: "The subject of revenue presented serious difficulties. Each legislative year brings with it changes and amendments in the revenue laws, and it may well be doubted whether anything permanent can be adopted without changes in the State Constitution. In obedience to the law creating this Commission, we have inserted as Title IX of Part III a revenue law, and have also placed an alternate Title in relation to revenue, which continues in force the present law, remitting the question to the wisdom of the Legislature."

Your committee have no hesitation in recommending the revenue law as it now stands in the Political Code. It is, as your committee believe, far superior to any Act upon the subject that has ever been devised in this State. And we would recommend, upon the adoption of this Code, the passage of an Act putting the Title relative to revenue and kindred provisions of the Penal Code into effect at once. We believe that under the law proposed in the Code the rate of State taxation for the present year would fall to sixty cents on the one hundred dollars; that thousands of dollars would be saved to the citizens of the State, and at the same time the revenue be more effectually collected.

Part IV, of

THE GOVERNMENT OF COUNTIES, CITIES, AND TOWNS.

Title I, of counties, is divided into two Chapters; the first relates to the boundaries and county seats of counties, and the second to general provisions concerning counties. No changes worthy of note have been made. Title II, of the government of counties, is divided into five Chapters, as follows: Chapter I. Counties as bodies corporate; II. The Board of Supervisors; III. County officers; IV. Salaries and fees of office; V. Other county charges.

These Chapters, in the main, are but the result of revisions of existing laws, and the only material change worthy of note is the attempted solution of

THE FENCE QUESTION.

This subject the Code, as reported, leaves in its present condition. The Commissioners had prepared a plan. Their plan provided in substance that the whole question should be remitted to the Boards of Supervisors of the several counties, who might, upon the petition of a majority of the electors of the county or of a district thereof, in the first event declare the whole county a fence district, and in the latter, the district a fence district, and "adopt and provide for the enforcement of rules and regulations for the government of landowners and residents of such districts, in the erection and maintenance of fences, prescribe their character and the materials of which they must be composed, and define the rights secured by an observance of such rules and regulations, 'and the forfeitures and penalties for their non-observance.'" It also provided that fence districts and fence regulations once ordained and established, must not be abrogated or abolished for a period of five years. We thought it advisable to omit this from the Code and leave it as a separate subject for consideration.

FEES AND SALARIES.

Upon this topic the Commissioners say: "We have not attempted to do anything relative to the fees and salaries of county officers, except to recapitulate the salaries of County Judges and District Attorneys as the law fixes them. It would be impossible at this day to establish a uniform and permanent system of fees and salaries. Each legislative year will bring contests over this subject, and it was deemed advisable to let the matter rest in the statutes, rather than to carry the present fee bills, at great expense, into a Code intended to be permanent."

Title III,

THE GOVERNMENT OF CITIES,

Embodies existing laws, and is divided into five Chapters, as follows: Chapter I. Cities as bodies corporate; II. Executive powers; III. Legislative powers; IV. Judicial powers; V. Certain statutes relating to cities and towns and existing corporations continued.

Cities acting under special charters or laws are not affected by the provisions of the Code, but may with the consent of the Legislature adopt such provisions.

GENERAL PROVISIONS.

Part V contains provisions which will apply to all the Codes. It relates to the definition and sources of law; the common law; the publication and effect of the Codes, and the express repeal of statutes. It is there provided that with relation to the Acts passed at this session of the Legislature the Codes must be construed as though they had been passed on the first day of the session; or, in other words, all laws passed at the present session prevail over laws upon the same subject in the Codes. With relation to each other, the Codes must be construed as though they had all been passed upon the same day and were parts of the same Acts. This Part also contains the rules by which conflicting sections—if any should be found—are to be harmonized.

If the provisions of different Titles of the Codes conflict with or contravene the provisions of other Titles, the provisions of each Title must prevail as to all matters and questions arising out of the subject matter of such Title.

The same rule is applied to Chapters and Articles. If conflicting provisions are found in different sections of the same Chapter or Article, the section last in numerical order prevails.

These provisions seem to have been inserted out of abundant caution, and are the ready remedies for almost any defect inherent.

It is also provided "that the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this State, is the rule of decision in all the Courts of this State." (Statutes 1850, p. 219.)

In conclusion, your committee may say of the bill for a Political Code that it has been prepared with great care; is a work worthy of our State; that its adoption will confer a lasting benefit upon the people.

We report the bill to the Legislature with our unqualified approval, and earnestly recommend it passage.

WILLIAM IRWIN, Chairman,
GEORGE OULTON,
M. P. O'CONNOR,
GEORGE C. PERKINS,
S. C. HUTCHINGS. } Senate Committee.

WILLIAM R. WHEATON, Chairman,
J. K. LUTTRELL,
J. A. EAGAN,
E. B. MOTT, Jr.,
W. N. DE HAVEN. } Assembly Committee.

REVISED LAWS

OF THE

STATE OF CALIFORNIA;

IN FOUR CODES:

POLITICAL, CIVIL, CIVIL PROCEDURE, AND PENAL.

POLITICAL CODE.

SACRAMENTO:
T. A. SPRINGER, STATE PRINTER.
1872.

INTRODUCTORY NOTE.

THIS volume nearly completes the work of the Commission. It has yet to undergo that final revision which has been bestowed upon each Code. The Codes are numbered from one to four, inclusive, in the following order: Political, Civil, Civil Procedure, and Penal. They, however, bear no dependent relation toward each other; each work is complete in itself, and each constitutes a separate Act; they were, in fact, completed—as in our opinion they ought to be examined and adopted—in the inverse order of their numbering.

We have not attempted to do anything relative to the Fees and Salaries of County Officers, except to recapitulate the salaries of County Judges and District Attorneys as the law fixes them.

It would be impossible at this day to establish a uniform and permanent system of fees and salaries. Each legislative year will bring contests over this subject, and it was deemed advisable to let the matter rest in the statutes, rather than to carry the present fee bills, at great expense, into a Code intended to be permanent.

Roads and Highways presented another subject of difficulty. Not less than one hundred and twenty-five Acts concerning roads and highways have been placed upon the statute books. We have prepared a general law, and inserted it as a chapter under Title VI of Part III. It is doubtful whether the condition of the State admits to-day of a general Road Law; if it does, the policy of enacting one is not a debatable question. In order that a difference of opinion on this question may not jeopardize the adoption of this Code, we have prepared an alternate chapter continuing in force the existing laws.

The subject of Revenue presented serious difficulties. Each

legislative year brings with it changes and amendments in the Revenue Laws, and it may well be doubted whether anything permanent can be adopted until we have changes in the State Constitution. In obedience to the law creating this Commission, we have inserted as Title IX of Part III a Revenue Law, and have also placed an alternate title in relation to Revenue which continues in force the present law, remitting the question to the wisdom of the Legislature.

Leaving out of consideration the subject of Fees and Salaries of County Officers, Roads and Highways, and Revenue, this Code is broader in its scope and leaves less to rest in yearly statutes than any Political Code ever presented for the consideration of a legislative body in a common law country.

Part V of this Code contains provisions which will apply to all the Codes. It relates to the definition and sources of law; the common law; the publication and effect of the Codes; and the express repeal of statutes.

It is there provided that with relation to the Acts passed at this session of the Legislature the Codes must be construed as though they had been passed on the first day of the session; or, in other words, all laws passed at the present session prevail over laws upon the same subject in the Codes.

With relation to each other, the Codes must be construed as though they had all been passed upon the same day and were parts of the same Acts.

This part also contains the rules by which conflicting sections (if any should be found) are to be harmonized. It provides for the publication of the Code, and expressly repeals all general laws the subject matter of which has been taken into the Codes.

The Commission are of the opinion that the Codes should take effect upon the first day of January, eighteen hundred and seventy-three, thus giving one year in which to publish and circulate them, and one year for their operation before the next Legislature assembles. In the last year the imperfections and incongruities which necessarily attend a work of this character will be apparent, and can then be remedied.

A singular misapprehension exists in circles that ought to be better informed, both as to the duties of and as to what the Commission has done. The statute of March twenty-eighth, eighteen hundred and sixty-eight, created a Commission to effect a revision

of the laws, and provided among other things that it should "*supply such additional provisions as may be required for the public welfare.*" The Act of April fourth, eighteen hundred and seventy, under which the present Commission was created, provides that this Commission should continue the labors of the one formed under the first Act, and should also "*recommend all such enactments as shall in the judgment of the Commission be necessary to supply the defects of and give completeness to the existing legislation of the State, and prepare and present bills therefor.*"

It will be seen that there was no limit set to the power of either Commission; the discretion of the Commissioners, and that alone, marked the extent of their powers.

Passing from the question of power to what we deemed "requisite for the public welfare," or as to what would give "completeness to existing legislation," it will be found that we contented ourselves in the main with an adherence to existing laws. The Penal Code, Code of Civil Procedure, and Political Code, embody existing laws, arranged in a convenient and logical form. Some slight additions have been made to give completeness to certain subjects; and the practice in civil actions, *after* judgment, has been simplified. We had but few laws that related to the civil rights of "persons and things"—such as the laws relating to the tenure, transfer, and mortgage of property; corporations, descents, and distributions; wills, notes, and bills of exchange, etc. All of these we have substantially retained, but they have been taken into what we present as the "Civil Code."

That Code is chiefly the work of the New York Commission. We took the New York Civil Code, and in place of the corresponding chapters, inserted our own laws, modified the rest of it to harmonize with our system, and recommend its adoption as a whole. It embodies the elementary principles of the common law relating to the ordinary business transactions of life; and while it would, if adopted, lighten the labors of the Bench and Bar, it would also give to the business man, in an accessible form, plain and simple rules for the conduct of his affairs. If any valid objections are urged to it, we have our own laws, that make part of the bill for a "Civil Code" as we have presented it, so well in hand that they can be drawn from the bill in a few hours, and, if adopted, would make a Civil Code of about one hundred and fifty pages, and thus the whole work would be in fact a revision.

The title of our work is "The Revised Statutes of California, in four Codes" (naming them). As the work is divided into volumes, it was necessary to give to each a name. We might have called them "The Revised Statutes of California, Vols. I, II, III, and IV," but this title would not at first call the attention to the particular volume to which one desired to refer; besides, if amended or cited, the title was not concise enough. For these, among other reasons, we called them respectively Political, Penal, Civil Code, and Code of Civil Procedure—names pointing at once to the contents of each volume, and only rendering a short reference necessary either for the purpose of citation or amendment. It is really not a matter of much moment. Nearly all the States have works similar in character. In some the word "Code" is used; in others "Revised Statutes." It is more a matter of taste or of convenience than a question of serious importance.

It may not in this connection be out of place to say that great injustice has been done the Commission which preceded this. That Commission cheerfully turned over to us the result of its labors. The plan adopted by us precluded the use of much of its work in the precise form in which it was presented, but we have availed ourselves of it in very many respects, to the material advantage and advancement of our work. It is but simple justice to the members of that Commission to make this statement and acknowledgment.

We have given to the duties of the Commission our best efforts. The work has been done as well as we could do it, and must speak for itself. We believe that if adopted it will prove of great benefit to the people, and save to them many times its cost every year. With its completion our duties and responsibilities cease, and those of the law making power begin.

We are soon to sever our official connection with the people of this State, and take this occasion to return our acknowledgments for aid extended to us by the public officers, press, profession, and citizens generally.

CREED HAYMOND,
JOHN C. BURCH,
Commissioners.

January, 1872.

CAMERON H. KING,
WILL J. BEATTY,
Secretaries.

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Tuolumne. SEC. 198. From the county seat of Tuolumne County to Sacramento, one hundred and fifteen miles; to Stockton, seventy miles; to San Quentin, two hundred miles.

Yolo. SEC. 199. From the county seat of Yolo County to Sacramento, twenty miles; to Stockton, sixty-six miles; to San Quentin, one hundred and fifty-one miles.

Yuba. SEC. 200. From the county seat of Yuba County to Sacramento, fifty miles; to Stockton, ninety-five miles; to San Quentin, one hundred and eighty miles.

Mileage, how computed. SEC. 201. When mileage is allowed by law to any person, the distance must be computed as herein fixed.

NOTE.—This Title is founded upon the following statutes: 1858, p. 258; 1861, p. 39; 1864, pp. 306, 154, 470; 1866, pp. 562, 563.

PART III.

OF THE GOVERNMENT OF THE STATE.

PART III.

OF THE GOVERNMENT OF THE STATE.

TITLE I.

PUBLIC OFFICERS.

TITLE VII.

GENERAL POLICE OF THE STATE.

CHAPTER I.

IMMIGRATION.

Duties of masters of vessels arriving in California.

SEC. 2949. Within twenty-four hours after the arrival of any vessel arriving at any of the ports of this State, bringing passengers from any place out of this State, the master of such vessel must make on oath to the Commissioner of Immigration at such port a written report.

Form of report.

SEC. 2950. The report must state:

1. The name, place of birth, last residence, age, and occupation of all such passengers who are not citizens, or who shall have within the last preceding twelve months arrived from any country out of the United States, and who have not been bonded or paid commutation money, as provided in this Chapter, as have been landed from any such vessel at any place during her last voyage, or who have gone on board of any vessel with the intention of coming into this State;

2. Whether any of the passengers so reported are lunatic, idiot, deaf, dumb, blind, crippled, or infirm, and not accompanied by any relatives able to support them;

3. Who may have died during the last voyage of such vessel; and,

4. The name and residence of the owner of such vessel.

Oath to be administered to certain passengers.

SEC. 2951. The master or commander of the vessel must administer to any passenger of foreign birth, who declares himself a citizen of the United States, the following oath: "I, ——— ———, do solemnly swear (or affirm) that I was born in ——; that I am a naturalized citizen of the United States; that I was naturalized and received my certificate of naturalization in the State of ——, in the year ——."

Bond may be required of owner or consignee of vessel.

SEC. 2952. The Commissioner of Immigration, by an indorsement on the report, may require the owner or consignee of the vessel from which such passengers have been landed to give a joint and several bond to the people

ARTICLE III.

FRAUDS AND PENALTIES.

Penalty for not reporting, or reporting falsely.

SEC. 3322. For every false report made, and for every neglect to make the report required in the preceding Article, the auctioneer thereby forfeits the sum of two hundred and fifty dollars, to be recovered on his bond.

Penalties, how recovered, and for what.

SEC. 3323. The penalties imposed by the provisions of this Chapter, not otherwise appropriated, must be prosecuted for by the District Attorney of the proper county, the moneys recovered to be paid to the County Treasurer for the use of the General Fund of the county.

Action on bond.

SEC. 3324. Any one aggrieved or damaged by any act of an auctioneer in violation of or contrary to the provisions of this Chapter, has an action against him and his bondsmen on his official bond therefor.

CHAPTER XIV.

FIRES AND FIREMEN.

Fire companies, how organized.

SEC. 3335. Fire companies in incorporated cities and towns are and may be formed and organized under special laws, or under authority conferred upon the city or town

government. Those in unincorporated towns and villages are and may be organized by filing with the Recorder of the county in which it is located a certificate in writing, signed by its Foreman or presiding officer and Secretary, setting forth the date of the organization, name, officers, and roll of its active and honorary members, which certificate and filing must be renewed every six months.

Stats. 1858, p. 50, Sec. 1; 1864, p. 42, Secs. 1, 2.

To elect officers and adopt and enforce by-laws.

SEC. 3336. Every such fire company must choose or elect a Foreman, who is the presiding officer and captain, and a Secretary and Treasurer, and may establish and adopt such by-laws and regulations, and impose such penalties, not exceeding five dollars or expulsion for each offence.

Firemen exempt from military and jury duty.

SEC. 3337. The officers and members of unpaid fire companies regularly organized and exempt firemen are not subject to military duty, except in case of war, invasion, or insurrection, nor are they subject to perform jury duty.

Stats. 1858, p. 50, Secs. 2, 6; 1864, p. 42, Secs. 1, 2; 1863-4, p. 250, Sec. 4; 1861, p. 585, Secs. 1, 2; 1862, p. 465, Sec. 1.

Exempt certificate, by and to whom issued.

SEC. 3338. Every fireman who has served five years in any organized fire company in this State is an "exempt fireman," and must receive from the Chief Engineer of the department to which he belonged a certificate to that effect. Every active fireman must have a certificate of that fact signed by the Chief of the Fire Department or the Foreman of the company to which he belongs; such certificates must be countersigned by the Secretary, and over the seal of the company, if one is provided. Either certificate entitles the holder to exemption from military and jury duty.

Stats. 1858, p. 50, Secs. 3, 6; 1864, p. 42, Sec. 1; 1863-4, p. 250, Secs. 2, 4, 5; 1861, p. 585, Sec. 1; 1862, p. 465, Sec. 1.

SEC. 3339. In lieu of issuing certificates to exempt firemen by the Chief of the Fire Department, as provided

County Clerk may issue exempt certificates, when.

in the last section, on the certificate of the Foreman and Secretary of any fire company, or the Chief of the Department, provision being made therefor in the by-laws of the company, "exempt certificates" may be issued by the Clerk of the county over his official seal and signature, which entitles the holder to like exemption from military and jury duty.

Stats. 1862, p. 245, Sec. 1.

NOTE.—Some companies may not provide seals, and this section authorizes companies by their by-laws to provide for the seal of the County Clerk to be affixed to exempt certificates.

Seal of Department, who to use and keep.

SEC. 3340. Every fire department regularly organized may adopt a department seal, having upon it the arms of the State, and the name of the particular fire department to which it belongs, which must be under the control of and for the use of the Secretary, and be by him affixed to exempt certificates, certificates of active membership, and such other documents as the by-laws may provide. The Secretary of every department having a seal must take the constitutional oath of office and give such bond as the by-laws provide for the faithful performance of his duties.

Stats. 1863-4, p. 250, Secs. 1, 2, 3.

Secretary to keep record, and certificate to be proof.

SEC. 3341. The Secretary of the fire department or fire company must keep a record of all certificates of exemption or active membership, the date thereof, and to whom issued; and when no seal is provided, similar entries of certificates issued to obtain County Clerk's certificate. Every such certificate is primary evidence of the facts therein stated.

Stats. 1863-4, p. 250, Secs. 4, 6.

Duties of Chief of Fire Department.

SEC. 3342. The Chief of every fire department must inquire into the cause of every fire occurring in the city or town of which he is the Chief, and keep a record thereof; he must aid in the enforcement of all fire ordinances duly enacted, examine buildings in process of erection, report violations of ordinances relating to prevention or extinguishment of fires, and when directed by

the proper authorities institute prosecutions therefor, and perform such other duties as may be by proper authority imposed upon him. His compensation must be fixed and paid by the city or town authorities.

Stats. 1863-4, p. 209, Secs. 3, 4.

Chief to attend fires and preserve property.

SEC. 3343. Every Chief of a fire department must attend all fires with his badge of office conspicuously displayed, must prevent injury to, take charge of, and preserve all property rescued from fires, and return the same to the owner thereof on the payment of the expenses incurred in saving and keeping the same, the amount thereof when not agreed to, to be fixed by the Police or County Judge.

Stats. 1863-4, p. 209, Secs. 2, 4, 5, 6.

Setting woods on fire.

SEC. 3344. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured.

Extinguishing fire in woods.

SEC. 3345. Whenever the woods are on fire any Justice of the Peace, Constable, or Road Overseer of the township or district where the fire exists may order as many of the inhabitants liable to road, poll, or labor tax residing in the vicinity as may be deemed necessary to repair to the place of the fire and assist in extinguishing or stopping it.

CHAPTER XV.

LICENSES.

ARTICLE I.

GENERAL PROVISIONS.

THE

POLITICAL CODE

OF THE

STATE OF CALIFORNIA.

ANNOTATED BY

CREED HAYMOND AND JOHN C. BURCH,

OF THE

CALIFORNIA CODE COMMISSION.

In Two Volumes.

VOL. I.

FIRST EDITION.

SACRAMENTO:
H. S. CROCKER & CO., BOOK AND JOB PRINTERS.
1872.

DEDICATION.

To Ex-Governor HENRY H. HAIGHT,

Under whose Administration the work of Codification of the Laws of California was commenced, and

To His Excellency, NEWTON BOOTH,

Under whose Administration the work was brought to a successful completion, these Volumes, relating to the Political Department of the Government, are respectfully dedicated, by

THE CODE COMMISSIONERS OF CALIFORNIA.

CALIFORNIA CODE COMMISSION.

CREED HAYMOND, *Ch'rm.*
JOHN O. BURCH.
JOHN H. McKUNE.

ADVISORY COMMITTEE.

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Honorable JOHN EAGAN.....of Amador.
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PREFACE.

THE POLITICAL CODE comprises those matters which pertain to the Government of the State, and the political subdivisions thereof; the election and appointment of all public officers, their powers and duties; all public police regulations; the constitution and management of all public institutions; and the disposition and management of the property of the public.

All notes which, in the opinion of the authors, would tend to enlighten the judgment of the *people* upon their rights under and their responsibilities to governmental authority, have been made to sections which, from their nature, seem to require explanation in order to be properly understood; and each individual member of the State, county, city, or town government will be thereby the better enabled to protect and vindicate his rights, and, without complaint from the Government, to promptly discharge his various duties. Such other notes containing references to standard authors and decisions of the State and Federal Courts, upon the same or similar provisions of law, are placed under the proper sections and subjects, so that the future deportment of the citizen may be governed by the experience of the past, under judicial sanction.

No pains have been spared by the authors to lighten the burdens attendant upon a faithful discharge of duty by all *public officers*. To this end authorities, such as approved standard works, decisions of the Courts, and frequent reference to the provisions of the State Constitution, which the law is intended to carry out, are freely used, and placed in such proximity that all may be observed together. In this respect, we hope that the work may become peculiarly effective.

This Code was originally intended to be bound in but one volume; but a determination to give a more careful annotation of the Federal and State Constitutions (to be found in the Appendix) rendered two volumes necessary. These annotations are elaborate, so to speak, for a work of this character. Since, in our form of government, "the voice of the people is the supreme law of the land," there can be no subject which ought to receive from the governed more careful study, and be more thoroughly understood, than the *Constitution;* no apology is necessary for their abundance. If the notes bring to the mind of all the vast importance of understanding the fundamental law, the beneficial results hoped for are half accomplished.

Many subjects of a local and special character are not embraced in these volumes, for obvious reasons. Subjects of this character, which have heretofore engrossed the attention of the Legislature, have been here attempted, at least, to be provided for by local authority or general laws providing ample provisions for all special cases, in the hope that at no distant day the halls of legislation, as clearly contemplated by the Constitution, may be effectually closed to appeals for legislation of this pernicious character. Laws generally regulating fees, fences, etc., have no place in this Code, for the reason that they are subjects of

such frequent legislation, that, until a positive beginning is made to cut off *special* and *local* legislation, we cannot hope for a successful conclusion. When this is accomplished, this Code is the place for general laws on these subjects. The unfilled numbers of sections between the ending of Titles, Chapters, and Articles, and the beginning of those succeeding them (usually ten), afford ample room for all future legislation necessary to make this Code a complete whole.

CREED HAYMOND,
JOHN C. BURCH.

SACRAMENTO CITY, September 15, 1872.

NOTE.

THE ABBREVIATIONS of authorities and reports used in this Code are the same as those used in THE CIVIL CODE, in which, by reference, an index fully explaining them will be found.

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TITLE I.

PUBLIC OFFICERS.

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GENERAL POLICE OF THE STATE.

CHAPTER I.

IMMIGRATION.

Duties of masters of vessels arriving in California.

2949. Within twenty-four hours after the arrival of any vessel arriving at any of the ports of this State, bringing passengers from any place out of this State, the master of such vessel must make on oath to the Commissioner of Immigration at such port a written report.

NOTE.—In the case of Lin Sing vs. Washburn, 20 Cal., p. 534, legislation on this subject by the State Legislature is freely discussed and considered as connected with commerce which Congress alone may regulate.—See, also, the "Passenger Cases," 7 Howard, U. S. Rep.; Brown vs. Maryland, 12 Wheat., p. 419. See, also, People vs. Nagle, 1 Cal., p. 232; People vs. Raymond, 34 Cal., p. 492. See, also, Penal Code Cal., Secs. 173-175, and notes. See, generally, note to Sec. 2968, post.

Form of report.

2950. The report must state:

1. The name, place of birth, last residence, age, and occupation of all such passengers who are not citizens, or who shall have within the last preceding twelve months arrived from any country out of the United States, and who have not been bonded or paid commutation money, as provided in this Chapter, as have been landed from any such vessel at any place during her last voyage, or who have gone on board of any vessel with the intention of coming into this State;

2. Whether any of the passengers so reported are lunatic, idiot, deaf, dumb, blind, crippled, or infirm, and not accompanied by any relatives able to support them;

3. Who may have died during the last voyage of such vessel; and,

4. The name and residence of the owner of such vessel.

al. vs. Middleton, 4 Cal., p. 64. Duties of auctioneer in accounting, and its purpose.—See State vs. Poulterer, 16 Cal., p. 514. Auctioneer entitled to his percentage, though purchaser refuse to take the realty sold on account of defect in the title.—Middleton vs. Findla, 25 Cal., p. 76; see note to Sec. 3284, ante.

ARTICLE III.

FRAUDS AND PENALTIES.

SECTION 3322. Penalty for not reporting, or reporting falsely.
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Penalty for not reporting, or reporting falsely.

3322. For every false report made, and for every neglect to make the report required in the preceding Article, the auctioneer thereby forfeits the sum of two hundred and fifty dollars, to be recovered on his bond.

NOTE.—For definition of mock auctions, and punishment therefor, see Sec. 535, Penal Code Cal.; see also id., Secs. 485, 486.

Penalties, how recovered, and for what.

3323. The penalties imposed by the provisions of this Chapter, not otherwise appropriated, must be prosecuted for by the District Attorney of the proper county, the moneys recovered to be paid to the County Treasurer for the use of the General Fund of the county.

Action on bond.

3324. Any one aggrieved or damaged by any act of an auctioneer in violation of or contrary to the provisions of this Chapter, has an action against him and his bondsmen on his official bond therefor.

CHAPTER XIV.

FIRES AND FIREMEN.

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Fire companies, how organized.

3325. Fire companies in incorporated cities and towns are formed and organized under special laws, or under authority conferred upon the city or town government. Those in unincorporated towns and villages are organized by filing with the Recorder of the county in which they are located a certificate in writing, signed by the Foreman or presiding officer and Secretary, setting forth the date of the organization, name, officers, and roll of active and honorary members, which certificate and filing must be renewed every six months.

NOTE.—Stats. 1853, p. 59, Sec. 1; 1854, p. 42, Secs. 1, 2.

To elect officers and adopt and enforce by-laws.

3326. Every such fire company must choose or elect a Foreman, who is the presiding officer, and a Secretary and Treasurer, and may establish and adopt by-laws and regulations, and impose penalties, not exceeding five dollars or expulsion for each offense.

Firemen exempt from military and jury duty.

3327. The officers and members of unpaid fire companies regularly organized and exempt firemen are not subject to military duty, except in case of war, invasion, or insurrection, nor are they subject to perform jury duty.

NOTE.—Stats. 1853, p. 59, Secs. 2, 6; 1854, p. 42, Secs. 1, 2; 1863–4, p. 260, Sec. 4; 1901, p. 635, Secs. 1, 2; 1862, p. 465, Sec. 1.

Exempt certificate, by and to whom issued.

3328. Every fireman who has served five years in an organized fire company in this State is an "exempt fireman," and must receive from the Chief

Francisco City, 1 Cal., p. 452. When for good cause or under apparent necessity a house is destroyed during a conflagration, in good faith, owner not entitled to damages.—See Surocco vs. Geary, 3 Cal., p. 69. See Sec. 590, Penal Code Cal., applicable to San Francisco only. See Secs. 1815, 1816, and notes, Civil Code Cal., Vol. I.

Setting woods on fire.

3344. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured.

NOTE.—See Sec. 384, Penal Code Cal. See Stats. 1871-2, p. 90, "An Act to prevent the destruction of forests by fire on public lands," approved Feb. 18, 1872, is provided for in the Penal Code, Sec. 384, supra, making a misdemeanor the act of firing the woods of public lands in certain cases.

Extinguishing fire in woods.

3345. Whenever the woods are on fire any Justice of the Peace, Constable, or Road Overseer of the township or district where the fire exists, may order as many of the inhabitants liable to road poll tax, residing in the vicinity, as may be deemed necessary, to repair to the place of the fire and assist in extinguishing or stopping it.

NOTE.—Penal Code Cal., Secs. 170, 177; also, 385. See, also, Stats. 1872, p. 90.

CHAPTER XV.

LICENSES.

ARTICLE I. GENERAL PROVISIONS.
II. CLASSIFICATION AND TAXES.

ARTICLE I.

GENERAL PROVISIONS.

Licenses to be prepared and printed.

3356. Each County Auditor must prepare and have printed blank licenses of all classes mentioned in this Chapter for terms of three, six, and twelve months, and for such shorter terms as are herein authorized to be issued, with a blank receipt attached for the signature of the Tax Collector when sold.

NOTE.—Stats. 1858, p. 170, Sec. 2; 1861, p. 446, Sec. 23. The distinction between a "license" and a "tax" considered, and a license held not to be a tax.—Anderson vs. Doll, 27 Cal., p. 607; The State vs. Poulterer, 18 Cal., p. 514. Stats. 1850, p. 352, considered and construed in State vs. Conkling, 20 Cal., p. 501. Stats. 1861, p. 412, "Intelligence office" considered and construed.—Ifull vs. San Francisco Bd. Sup., 20 Cal., p. 591. Foreign miners' licenses are omitted; the collection thereof having been prohibited in our State by the Federal Courts.

Auditor to number, sign, and deliver.

3357. The County Auditor must affix his official seal to, number, and sign all licenses, and from time to time deliver them to the Tax Collector in such quantity as may be required, taking his receipt therefor, and charge him therewith, giving in the entry the numbers, classes, and amount thereof.

NOTE.—Stats. 1867, p. 417, Sec. 85.

Auditor to keep stamps and license account.

3358. The Auditor must keep in his office the stamps of all licenses by him delivered to the Tax Collector, and a ledger in which he must keep the Collector's account for all licenses delivered to him, sold, or returned unsold by him. A correct statement of the Collector's license account must be certified to the County Treasurer each month by the Auditor.

THE

POLITICAL CODE

OF THE

STATE OF NEW YORK.

REPORTED COMPLETE

BY THE

COMMISSIONERS OF THE CODE.

ALBANY:
WEED, PARSONS & COMPANY, PRINTERS.
1859.

TO THE LEGISLATURE OF THE STATE OF NEW YORK:

The Commissioners of the Code, appointed by the act of April 6, 1857, beg leave to make this their third

REPORT:

And to submit herewith the Political Code complete.

Since their last report they have re-examined their draft, as required by law, considered the suggestions which have been received, and made such corrections and changes as seemed desirable. After doing this, they caused the work as finally agreed upon by them, to be distributed to all the Judges of the Court of Appeals, of the Supreme Court, Superior Court, and Common Pleas of the city of New York, and to all the County Judges, Surrogates and County Clerks; and, six months having since elapsed, it is now submitted to the Legislature, together with the draft of a bill to repeal the various statutes thus revised and consolidated.

The Commissioners regret that circumstances, unforeseen at the time of their second report, have prevented them from presenting the Penal Code at the present session.

They have prepared considerable portions of the Civil Code, and hope to be able to present them at the next session of the Legislature.

All which is respectfully submitted,

DAVID DUDLEY FIELD.
WM. CURTIS NOYES.
ALEXANDER W. BRADFORD.

NEW YORK, *April* 10, 1860.

PART III.

TITLE I.

PUBLIC OFFICERS.

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FIRES.

In the county of Schuyler, Havana and Watkins.

In the county of Seneca, Seneca Falls and Waterloo.

In the county of Steuben, Bath.

In the county of Suffolk, Greenport and Sag Harbor.

In the county of Sullivan, Bloomingburgh and Monticello.

In the county of Tioga, Owego.

In the county of Tompkins, Ithaca.

In the county of Ulster, Kingstown and Rondout.

In the county of Warren, Glens Falls.

In the county of Washington, Argyle, Fort Ann, Salem, Sandy Hill, Union Village and Whitehall.

In the county of Wayne, Clyde, Lyons, Newark and Palmyra.

In the county of Westchester, Peekskill, Portchester, Sing Sing and Yonkers.

In the county of Wyoming, Attica, Perry and Warsaw.

In the county of Yates, Penn Yan.

Other villages have been established under the general law for the incorporation of villages, passed the 7th day of December, 1847; the names of which with their boundaries are recorded in the offices of the clerks of their respective counties.

In the New York Civil List (1869, p. 23, note) it is stated that the village of Bridgewater, in Oneida county, is not now considered a corporation.

PART III.

TITLE I. Public officers.
II. General rights of the state.
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TITLE I.

PUBLIC OFFICERS.

CHAPTER I. Classification.
II. Legislative officers.
III. Executive officers.
IV. Judicial officers.
V. Ministerial and other officers connected with the courts.
VI. General provisions relating to different classes of officers.

CHAPTER I.

CLASSIFICATION.

§ 30. The public officers of the state are classified as:

1. Legislative;
2. Executive;
3. Judicial;
4. Ministerial officers and officers of the courts;

coaches or carriages in any city, nor affect laws or ordinances of any city for the licensing or regulating such coaches or carriages.

2 R. S., 105, § 8.

Telegraph lines may be erected.

§ 673. Incorporated telegraph companies, may construct their lines on any of the public ways and across any of the public waters of this state, in such manner as not to incommode the public use of such ways. But this is not to be construed to impair private rights, nor to authorize the construction of any bridge or similar erection.

Ib., 98, § 42; 1276, § 5.

Protection of bridges.

§ 674. The owner of any toll-bridge, and any plankroad company owning a bridge of not less than twenty-five feet span, may put up, conspicuously, at each end of it, notice in these words, in large characters: "One dollar fine for riding or driving on this bridge faster than a walk;" and whoever rides or drives faster than a walk on such bridge shall forfeit to the owner the sum of one dollar.

1 R. S., 1053, § 145; Laws of 1854, ch. 87, § 5.

Canal and railway companies to furnish maps, &c.

§ 675. Every canal company and railway company in this state, which asks the aid of the state, shall, so far as may be in their power without making a new survey, furnish to the state engineer and surveyor copies of all maps, plans, drawings, levels and surveys of every description which may be made in connection with the construction of their canal or railway.

Ib., 401, § 9.

TITLE IV.

GENERAL POLICE OF THE STATE.

The provisions respecting stock-jobbing we have wholly omitted. By the act of 1858 (Laws of 1858, ch. 134, p. 251) the provisions of the Revised Statutes on this subject were repealed. The first section of that act declared that no contract for the transfer of stock, &c., should be voidable for want of consideration. The object of the act seems to be, not to make that which is a nude pact binding as a contract; but rather to place contracts for sale of stocks on the same basis as other contracts in this respect. This object is best answered by omitting all provisions in reference to such contracts; which we have accordingly done.

clerk or servant does so, is liable in damages to any party injured in consequence thereof.

[1] 2 R. S., 677, § 25.

CHAPTER VII.

FIRES.

Fire companies.

§ 760. Except in an incorporated city or village, fire companies may be formed in any town as follows: The supervisor and the justices of the peace may appoint, in writing, any number of the inhabitants, not exceeding forty, to each fire engine procured for the town, and, in the same manner, may fill vacancies from time to time, in such company. Every such fireman, and all the members of any fire company or hook and ladder company, appointed pursuant to any statute, are exempt, while they are such, from jury service in courts of record, and, except in war, insurrection or invasion, from military duty.

1 R. S., 666, § 5; 667, § 8.

Powers of companies.

§ 761. Each such fire company, shall choose a captain and clerk, and may establish such by-laws

and regulations, and impose such penalties, not exceeding five dollars for each offense, as necessary to enforce performance, by the firemen, of their duty.

1 R. S., 667, § 6.

Penalties, how collected and expended.

§ 762. Such penalties may be collected by the captains in any court having cognizance thereof, and shall be expended for the repair and preservation of the engines and apparatus.

Ib., 667, § 7.

Firing woods.

§ 763. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured, and is guilty of a misdemeanor.

2 Ib., 106, § 1.

Extinguishing fires in woods.

§ 764. Whenever the woods in any town are on fire, the justice of the peace, the supervisor and the commissioners of highways, and each of them, shall order so many of the inhabitants liable to work on the highways, and residing in the vicinity, as they severally deem necessary, to repair to the place of the fire and assist in extinguishing or stopping it.

Ib., § 2.

Penalty.

§ 765. Any person who neglects to comply is liable to a penalty of fifty dollars, and is guilty of a misdemeanor. The penalty shall be applied as a reward to such person or persons as a majority of the officers mentioned deem best entitled thereto

CALIFORNIA CODE COMMENTARIES (1872)

by Charles Lindley
Summary by Legislative Intent Service

In 1872, Code Commissioner Charles Lindley published an extensive treatise on the codification process. The treatise is sparse on comment on particular provisions of law. Most of the discussion that mention specific sections is questioning the location of the provision on the codes, rather than explaining the background or intent of the substantive law. Rather than send the full document, we have summarized the comments that do address the Political Code.

The following page references comments to proposed code sections in the Political Code.

PAGE(S)	CODE SECTION(S)	COMMENTS
44 - 52	Political Code §§ 44-49	Eminent domain provisions should be in Political Code.
64 - 67	Political Code §§ 2766, 4046	Examples of sections with multiple paragraphs.
67 - 69	Political Code §§ 384-385, 417-421	State salaries. Too many sections, should be consolidated.
70 -71	Political Code § 14	Inconsistent method of cross-referencing with the sections on official seals.
71 - 72	Political Code §§ 4478, 4479	Comments and illustrations relating to the adequacy of these sections which allow later enactments to supersede codes.

THE

PENAL CODE

OF

CALIFORNIA.

ANNOTATED BY

CREED HAYMOND AND JOHN C. BURCH,

OF THE

CALIFORNIA CODE COMMISSION.

FIRST EDITION.

SACRAMENTO:
H. S. CROCKER & CO., BOOK AND JOB PRINTERS.
1872.

DEDICATION.

TO THE HONORABLE WILLIAM T. WALLACE.

Chief Justice of the Supreme Court of the State of California, as a token of the high appreciation in which are held his legal attainments and scholarly attributes, this Volume is respectfully inscribed, by the

AUTHORS.

CALIFORNIA CODE COMMISSION.

CREED HAYMOND, *Ch'rm.*
JOHN C. BURCH.
JOHN H. McKUNE.

ADVISORY COMMITTEE.

HON. CHARLES A. TUTTLE.
HON. SIDNEY L. JOHNSON.

SECRETARIES: CAMERON H. KING.
WILL J. BEATTY.
CURTIS H. LINDLEY.

LEGISLATIVE COMMITTEE.

JOINT COMMITTEE.

Senate.	*Assembly.*
W. W. PENDEGAST, *Ch'rm.*	C. G. W. FRENCH, *Ch'rm.*
JAMES VAN NESS,	F. E. SPENCER,
A. COMTE, JR.,	A. D. SPLIVALO.
JAMES T. FARLEY.	

PREFACE.

IN presenting this edition of the ANNOTATED PENAL CODE OF CALIFORNIA to the public the authors have little to say which was left unsaid in the prefaces to the Annotated Civil and Political Codes. We have endeavored to make this a *useful* book to the profession—prosecuting or defending—as well as to the Courts and officers of the law. As all enactments are to be found in this Code which prescribe punishments for violations of the laws contained in the other Codes, frequent references are made to them, especially the Political. Heretofore it was the practice of the legislative department to declare a public or private right, and in the same Act to affix a penalty for its violation—and so invariably with the declaration of wrongs. Under the system here adopted all the penal clauses of the law are congregated together, under appropriate headings, in the Penal Code, whilst the laws creating or recognizing "rights" are to be found in the Political or Civil Code, and sometimes in the Code of Civil Procedure; so, too, is it in occasional instances with the declaration or description of wrongs or injuries which are punishable criminally. It is to be hoped that this system and classification may never be departed from. In justice to the work we make an extract from the report of the Advisory Committee:

"The Advisory Committee on the Revision of the Laws have the honor to submit to you, and through you to the Legislature, their report upon the Penal Code.

"They have made a careful and critical examination of the Penal Code prepared by the Revision Commission. In doing so they have compared it, section by section, with our existing laws, and also with the Criminal Codes of some of the most

populous States. In the performance of this labor they have constantly consulted with the Commissioners and suggested such amendments as they deemed advisable.

"The Act of April fourth, eighteen hundred and seventy, providing for a Commission for the Revision of the Laws, requires the Commissioners to 'correct verbal errors and omissions, and to suggest such improvements as will introduce precision and clearness into the wording of the statutes,' and 'to recommend all such enactments as shall, in the judgment of the Commission, be necessary to supply the defects of, and give completeness to, the existing legislation of the State.'

"In the preparation of the Penal Code, the Commissioners have strictly followed the direction of the law. While many sections of existing laws have been redrawn to correct verbal errors and to give them precision and clearness, their spirit and substance have, in all cases, been preserved. In a few instances terms of imprisonment have been changed, but such changes are confined to cases where there was an inequality in the period of punishment between crimes of a higher and lower grade. Many new sections have been introduced, but these were necessary to 'supply the defects of and give completeness to the existing legislation of the State.'

"We believe that the bill for an Act to establish a Penal Code, as now prepared by the Commissioners, should be enacted into a law. No inconvenience can arise from its adoption, as full provision has been made for the punishment of offenses committed before it takes effect.

"Our thanks are due to the Commissioners for the courtesy they have extended to us, and for the readiness they have at all times manifested to aid us in our investigations. In the preparation of this Code they have earned and deserve the thanks of the legal profession and of the State."

We also call attention to the report of the Legislative Committee, which concludes as follows:

"That it is exceedingly desirable to have a complete and harmonious system of laws which can easily be understood by all the citizens of the State, no one will deny. Your committee believe that this has been accomplished so far as the same is practicable, and therefore have reported the bill for an Act to establish a Penal Code to the Senate, and recommend to the Legislature that it pass. The States of Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, and New Jersey, have already adopted a system of revised laws or codes. The States of Florida, Georgia, Illinois, Iowa, Michigan, Mississippi, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin at the present time have employed skilled lawyers to revise or codify their laws. The necessity that exists for the performance of this work has been appreciated everywhere, and California should be, as it ever has been heretofore, among the first to take any step that tends toward improvement.

"Your committee believe that the system of law as embodied in the Penal Code prepared by the Revision Commission is more perfect than that prepared by any other State, and it would be well for the honor of California if by the action of the present Legislature it should adopt this great work, thus setting an example which will be speedily followed by all her sister States, adding new laurels to the fame which she has already so justly acquired, and at once becoming, as has been remarked, not only a lawgiver to the thousands within her borders, but to the millions who are to succeed them, and by the force of her example to not only the vast population of the whole Pacific Coast, but to the millions of citizens of other States, who will soon follow in her footsteps. Then, when the laws of all the States in this great Federation are harmonious and in sympathy with each other, California, having made the first advance toward this high aim, will be entitled to the first post of honor and to the gratitude of the whole country."

The language of these two reports cannot be mistaken; they favor the system which these Codes present. Their fair trial is solicited.

CREED HAYMOND,
JOHN C. BURCH.

SACRAMENTO CITY, October 10th, 1872.

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CHAPTER I.

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Unlicensed piloting.

A 527 - 75-4

379. Every person, not authorized to act as pilot under the laws of this State, who pilots or offers to pilot any vessel to or from any port of this State for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor.

NOTE.—Founded upon Stats. 1869-70, p. 843, Sec. 17. That Act applies only to the port of San Francisco, but for the same reasons should be extended to all ports in this State having commissioned pilots. See "Pilots and Pilot Regulations," generally, Secs. 2420-2447; San Francisco, etc., id., Secs. 2457-2468; Humboldt Bay, etc., id., Secs. 2476-2491; and San Diego, Stats. 1871-2, pp. 650-652, Pol. Code Cal., note to Sec. 2491.

Apothecary omitting to label drugs, or labeling them wrongfully, etc.

380. Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

NOTE.—The frequent occurrence of accidents, involving, often, upon the loss of human life, through mistakes in the putting up of prescriptions, render necessary some legislation to enforce care and caution on the part of dealers in drugs. The recent case of Thomas vs. Winchester, 2 Seld., p. 397, illustrates the danger arising in a different class of cases, also embraced in the

text of this section, viz.: cases in which a manufacturer or dealer in drugs sends them into the market under an untrue label; in consequence of which, retail dealers are innocently led to supply dangerous articles without intending it. In that case it appeared that defendants, who were manufacturing druggists, sold to a dealer a jar labeled, "Extract of dandelion," but which really contained extract of belladonna. The dealer, relying on the label, sold the jar to a retailer; and the latter, in turn, used a part of the contents of the jar, supposing them to be extract of dandelion, in putting up a prescription in which that article was required. A dangerous illness was the result to the person taking the prescription. The Court of Appeals, in the case cited, held the manufacturers liable in damages to the injured person, notwithstanding the article had passed through intermediate sales, in reaching such person. This liability is founded upon the duty which the law imposes upon the dealer, to avoid acts dangerous to other persons; and not upon any contract or privity between him and the consumer. Obvious considerations make it proper that this duty should be enforced by criminal penalty as by a remedy in damages.—See Civil Code Cal., Secs. 1708, 3333, 3523—wrongs and damages therefor.

Putting extraneous substances in packages of goods usually sold by weight, with intent to increase weight.

381. Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel, or package, is punishable by a fine of twenty-five dollars for each offense.

A 527 - 75-4

Adulterating food, drugs, liquors, etc.

382. Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor, or wine, or any article useful in compounding them, with a fraudulent intent to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

NOTE.—This and the succeeding section is based upon Sec. 125 of the Crimes and Punishment Act (Stats. 1850, p. 229), and upon the Acts to prevent the adulteration of food, milk, etc.—Stats., 1860, p. 180; 1862, p. 484; 1870, p. 205. The section follows the language of the New York Penal Code, Secs. 451, 452.

Disposing of tainted food, etc.

383. Every person who knowingly sells, or keeps or offers for sale, or otherwise disposes of any article of food, drink, drug, or medicine, knowing that the same has become tainted, decayed, spoiled, or otherwise unwholesome or unfit to be eaten or drunk, with intent to permit the same to be eaten or drunk, is guilty of a misdemeanor.

Setting woods on fire.

384. Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain, on any lands, is guilty of a misdemeanor.

NOTE.—Stats. 1852, p. 111, Sec. 1.

Stats. 1871-2, p. 96.

An Act to prevent the destruction of forests by fire on public lands.

[Approved February 12, 1872.]

[Enacting clause.]

SECTION 1. Any person or persons who shall willfully and deliberately set fire to any wooded country or forest belonging to this State or the United States, within this State, or to any place from which fire shall be communicated to any such wooded country or forest, or who shall accidentally set fire to any such wooded country or forest, or to any place from which fire shall be communicated to any such wooded country or forest, and shall not extinguish the same, or use every effort to that end, or who shall build any fire, for lawful purpose or otherwise, in or near any such wooded country or forest, and through carelessness or neglect shall permit said fire to extend to and burn through such wooded country or forest, shall be deemed guilty of a misdemeanor, and on conviction, before a Court of competent jurisdiction, shall be punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment; *provided*, that nothing herein contained shall apply to any person who in good faith shall set a back fire to prevent the extension of a fire already burning. All fines collected under this Act shall be paid into the County Treasury for the benefit of the Common School Fund of the county in which they are collected.

The Act of 1872, p. 205, providing a punishment for burning other houses and property, is void under Sec. 330, Political Code, it being amendatory of an Act repealed by this Code. It is amply provided for under "Arson" and "Malicious mischief," post.

Obstructing attempts to extinguish fires.

385. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to or interference with the lawful efforts of any fireman or company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

NOTE.—See "Fires and Firemen," Political Code Cal., Secs. 2325-2345, and notes.

Maintaining bridge or ferry without authority.

386. Every person who demands or receives compensation for the use of any bridge or ferry, or sets up or keeps any road, bridge, ferry, or constructed ford for the purpose of receiving any remuneration for the use of the same, without authority of law, is guilty of a misdemeanor.

NOTE.—See Political Code, Index, Titles "Bridges," "Ferries," etc.

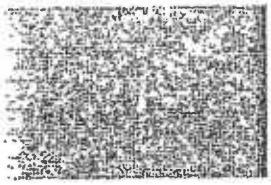
Violating condition of undertaking to keep ferry.

387. Every person who, having entered into an undertaking to keep and attend a ferry, violates the conditions of such undertaking, is guilty of a misdemeanor.

NOTE.—See Political Code Cal., Secs. 2350, 2394, et alia.

Riding or driving faster than a walk on toll bridges

388. Every person who willfully rides or drives faster than a walk on or over any toll bridge, law-



LEGISLATIVE
INTENT SERVICE, INC.

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DECLARATION OF MARIA A. SANDERS

I, Maria A. Sanders, declare:

I am an attorney licensed to practice in California, State Bar No. 092900, and am employed by Legislative Intent Service, Inc. a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the 1872 enactment of former Civil Code section 3346.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on former Civil Code Section 3346 of 1872. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

1872 ENACTMENT OF CIVIL CODE SECTION 3346:

	1.	Procedural History of the 1872 California Civil Code prepared by Legislative Intent Service
x	2.	Excerpt regarding Civil Code Articles III and IV from The Civil Code of the State of California, annotated by Creed Haymond and John C. Burch, Vol.I and Vol.II, 1872;
x	3.	Excerpt regarding proposed Civil Code Articles III and IV from the Revised Laws of the State of California in Four Codes, 1871
x	4.	Excerpt regarding New York Civil Code Articles III and IV from The Civil Code of the State of New York, 1865;
x	5.	Excerpt regarding proposed New York Civil Code Section 1505, subsection 18, from a Draft of a Civil Code for the State of New York, 1862;

x	6.	Excerpt regarding Title 6 of Chapter 5 from The Revised Statutes of the State of New York, 1829;
x	7.	Excerpt regarding Section XXIX of Chapter LVI from the Laws of the State of New York, 1913;
	8.	Brief articles on David Dudley Field and the Code Napoleon from www.britannica.com, www.factmonster.com and www.frenchculture.com;
	9.	Chipman v. Hibberd (1906) Cal. 162;
	10.	Stukeley v. Butler (1829) 1 Hobart 10;
	11.	Barrett v. Wright (1845) 13 Pickering 44;
	12.	Clap v. Draper (1843) 4 MASS. 266;
	13.	Putney v. Day (1835) 6 New Hampshire 430;
	14.	Griffin v. Bixby (1845) 12 New Hampshire 454;
	15.	Haskin v. Record (1861) 32 Vermont 575;
	16.	Gronour v. Daniels (1847) 7 Blackford 108.

x Exhibits preceded by an "x" are excerpted. The original exhibit is lengthy and may not contain any further discussion relevant to your concern. The entire exhibit, or further portions of it, will be made available on your request.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 5th day of September, 2008 at Woodland, California.

MARIA A. SANDERS

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THE PROCEDURAL HISTORY OF
THE 1872 CALIFORNIA CIVIL CODE
(Prepared by Legislative Intent Service)

DOCUMENTS AVAILABLE UPON REQUEST

1. Excerpt of the preface and amendments from the "rejected edition"of Revised Laws of the State of California, Civil Code, 1871;
2. Excerpt of the preface from the Civil Code of the State of California, annotated by Haymond and Burch, Volume 1, 1872;
3. Report of the Joint Committee on the Revision of the Civil Code, 1871-72;
4. Excerpt regarding Senate Bill 430 from the Journal of the Senate, 1871-72;
5. Excerpt regarding Senate Bill 430 from the Journal of the Assembly, 1871-72;
6. News articles regarding the Revision Commission from the Sacramento Daily Union, November 13, 1871 and January 1, 1872;
7. News articles regarding Senate Bill 430 from the Sacramento Daily Union, March 8, 16, and 18, 1872.

The California Civil Code was adopted in 1872 following the enactment of Senate Bill 430, "An Act to Establish a Civil Code." (See Document #4)

The Civil Code was prepared by the California Code Commission, also known as the Revision Commission, which began its work on May 4, 1870. The Commission completed the Civil Code by November of 1871. The California Civil Code was modeled after the New York Civil Code, and in a great measure was a reprint of it. (See Document #6) The Commission acknowledged the New York Code in their preface of the 1871 Civil Code, writing:

> Those who choose to follow the Commission through this Code should obtain a copy of the New York Civil Code, as a better means of testing the accuracy of our work.
> (See Document #1)

On December 25, 1871, the Commission prepared amendments to the Civil Code, most of which were technical in nature. Substantive amendments were also made which added provisions relative to the Transfer of Real Property, the Recording of Transfers, and Mortgages. (See Document #1) With regard to the December amendments, the Commission prepared the following note:

> The printed volume and these amendments represented the Civil Code as adopted by the Commission. The Penal Code, Code of Civil Procedure, and Civil Code are not in bill form, and so far as the action of this Commission is concerned, are completed. . . .
>
> The work will speak for itself, and must stand or fall upon its merits or demerits.
> (See Document #1)

As completed, the Commission analyzed the Civil Code as follows:

> It is divided as follows: Division I-Of Persons; Division II-Of Property; Division III-Of Obligations; Division IV-Of General Provisions relating to persons, property and obligations. . . . The laws relating to corporations are taken from the statutes of California, carefully revised and corrected, with but a few modifications. . . . Within the original matter in this code is contained a revision of all our statutes relating to the rights of persons and the rights of things.
> (See Document #6)

The Civil Code was reviewed by the Advisory Committee on the Revision of the Laws and the Joint Committee on Revision of the Civil Code. (See Documents #3 and #7) The Advisory Committee recommended the adoption of the Code after carefully examining it and comparing it section by section with California's then existing laws and the laws of the most populous states.
(See Document #7)

The Joint Committee on Revision also, after careful examination, recommended the adoption of the Civil Code. In their report to the Legislature, the Joint Committee reported:

> Your committee have examined the bill for a Civil Code, prepared by the Revision Commission and approved by Messrs. Johnson and Tuttle, the Advisory Board, and take great pleasure in concurring in their report.
>
> We give to this Code our unqualified approval and endorsement, and herewith report it to the Legislature and recommend its adoption.
> (See Document #3)

The California Civil Code was introduced in bill form on March 15, 1872 by former Senator Pendegast as Senate Bill 430, "An Act to Establish a Civil Code." (See Document #4)

As introduced in the Senate, Senator Pendegast described the new California Civil Code as follows:

> The Civil Code embraces in its first division the laws concerning persons, both natural and artificial, their rights and relations; in the second, the laws of property and its acquisition; in its third division, those governing obligations and contracts of every kind; and in the fourth, general provisions applicable to the subjects of the three preceding divisions, showing the principles on which relief is given and measured, or preventive redress afforded. In a word, this volume is intended to embrace the whole subject of the rights of persons and property.
> (See Document #7)

Senator Pendegast described the composition of the Civil Code as follows:

> The Statute laws of this state occupy perhaps less than a third of the volume. The rest consists almost literally of the code prepared for the State of New York. As far as it is possible we have endeavored to see that our statute law was properly coordinated and harmonized with the law taken from the Code of New York.
> (See Document #7)

Senate Bill 430 was read twice before the Senate, then Senator Pendegast moved for a suspension of the Senate rules for purpose of reading Senate Bill 430 a third time. (See Document #7) The motion prevailed and Senate Bill 430 passed the Senate on March 6, 1872. (See Document #7)

In the Assembly, Senate Bill 430 was read twice on March 15, 1872. (See Document #5) On March 16, 1872, Senate Bill 430 was read a third time and passed with only three dissenting votes. (See Document #7) Following passage by the Senate and Assembly, Senate Bill 363 was approved on March 21, 1872 by former Governor Newton Booth. (See Document #4)

In August 1872, the California Code Commission, in particular, Commissioners Haymond and Burch prepared an annotated version of the Civil Code. (See Document #2) This edition of the Civil Code typically contains more annotations than those found in the 1871 edition.

For example, the annotations in the 1871 edition cite the actual source of a particular code provision, while the annotations in the 1872 edition refer to the source of that section and cite the applicable law on that particular subject.

In the preface of their 1872 annotated edition, the Commissioners commented on the purpose of their annotated edition as follows:

> It is, then, the object of the notes attached to the various section of the Codes to explain the reason and intent of the law, to make it clear and easy of comprehension, and to show its application, not only generally, but to circumstances which, though within the principle, may not fall strictly within the letter, of the statute. Thus, for example, where illustration of a particular section several leading decisions are given, it will be seen that, though they may all be in support if the principle, yet the facts or minutiae of the cases are very diverse.
> (See Document #2)

In addition to the aforementioned annotations, the Commissioners also noted:

> All the statutes passed by the Legislature of 1871-72, which affect provisions of the Code, are printed in the form of notes under the sections to which they relate.
> (See Document #2)

THE

CIVIL CODE

OF THE

STATE OF CALIFORNIA.

ANNOTATED BY

CREED HAYMOND AND JOHN C. BURCH,

OF THE

CALIFORNIA CODE COMMISSION.

In Two Volumes.

VOL. I.

FIRST EDITION.

25

SACRAMENTO:
H. S. CROCKER & CO., BOOK AND JOB PRINTERS.
1872.

PREFACE.

THE Governor of the State of California, acting under authority of law, appointed in May, eighteen hundred and seventy, three Commissioners to draft a complete system of laws, and to present the same to the Legislature next to convene. To this task the Commissioners applied themselves, and with painstaking care and great labor completed and presented a report in four volumes, respectively entitled the "POLITICAL," "CIVIL," "CIVIL PROCEDURE," and "PENAL" CODES. These were critically examined by an Advisory Committee, consisting of two eminent members of the legal profession—Messrs. Sidney L. Johnson and Charles A. Tuttle—and, after a careful review by the Legislative Committees, were enacted into laws. Each is to a great extent independent of the other.

The POLITICAL CODE comprises those matters which pertain to the Government of the State, the powers and duties of its officers, and the nature and management of its public institutions.

The CIVIL CODE embraces the rights of persons, their relations toward each other, and the rules applicable to and governing property; or, in other words, comprehends within its scope those divisions of the law which are defined by Blackstone as "The Rights of Persons" and "The Rights of Things."

The CODE OF CIVIL PROCEDURE relates to Courts of justice and judicial officers, etc., and the *means* employed for the enforcement of rights and the remedies for their violation.

The PENAL CODE consists of a systematic classification of public wrongs or offenses against the State, and laws for their prevention or for the punishment of those offending.

The reasons which prompt the publication of an *annotated* edition may be briefly stated: In the interpretation of statute law, Courts have always professed to be governed to some extent by the intent of the Legislature, and to take judicial notice of the right sought to be established or the mischief intended to be avoided. The authors of the notes to this edition, having been members of the Commission which drafted the Codes and in constant attendance upon the meetings of the Advisory and Legislative Committees, have had ample opportunity to inform themselves upon these subjects.

A Code of laws, from its universality, cannot be always readily adapted, especially by those unskilled in the profession, to fit each individual case.

It is, then, the object of the notes attached to the various sections of the Codes to explain the *reason* and *intent* of the law, to make it clear and easy of comprehension, and to show its application, not only generally, but to circumstances which, though within the *principle*, may not fall strictly within the *letter*, of the statute. Thus, for example, where in illustration of a particular section several leading decisions are given, it will be seen that, though they may all be in support of the *principle*, yet the facts or minutiæ of the cases are very diverse. It may in this way frequently happen that the reader, by reference to a section enunciating a comprehensive legal proposition, will find in the note thereto cases which run parallel with and afford a satisfactory solution of the difficulties involved in the questions which he has under investigation. In some places the Code modifies or alters what has heretofore been the law. Wherever this occurs the reason for the change is given—the hardships which existed under the former law, and how the present enactment applies to prevent their future occurrence. It is not presumed that the work is perfect. Indeed, the authors realize that there is room for much improvement; but their anxiety to place before the public, at as early a day as possible, the laws of the State, thus annotated and enriched with the learning of many distinguished jurists and the decisions of Courts of high standing, must plead their excuse. A copyright

has, however, been obtained for the work, and should it meet with the favor and approbation of the public, a foundation will at least have been laid upon which they can in future erect a more finished and complete structure. Little is claimed for this edition on the ground of originality, except in digesting and arranging under their appropriate heads the decisions of Courts and extracts from leading law writers. But when it is borne in mind that the notes contain references to over ten thousand reported cases, beside extensive reference to text books, it will be perceived that much time and labor have been expended in their production. All the statutes passed by the Legislature of 1871–2, which affect any provisions of the Code, are printed in the form of notes under the sections to which they relate.

An exhaustive index to the subject matter (prepared by Mr. Curtis H. Lindley) accompanies the work, and also a list of abbreviations used in the notes. There are also published herewith the Constitutions of the United States and of the State of California, carefully annotated, and Part V of the POLITICAL CODE.

The authors deem this an appropriate place to render to Mr. Cameron H. King, Secretary of the Code Commission, their acknowledgments for the valuable services rendered by him in assisting in the annotation and in the preparation of this work for the press.

CREED HAYMOND,
JOHN C. BURCH.

SACRAMENTO, CAL., August 1st, 1872.

ANALYSIS OF THE CONTENTS.

DIVISIONS.

I.—THE FIRST RELATING TO PERSONS.
II.—THE SECOND TO PROPERTY.
III.—THE THIRD TO OBLIGATIONS.
IV.—THE FOURTH CONTAINS GENERAL PROVISIONS RELATING TO THE THREE PRECEDING DIVISIONS.

PRELIMINARY PROVISIONS.

THE CIVIL CODE

OF THE

STATE OF CALIFORNIA.

IN FOUR DIVISIONS.

THE

CIVIL CODE

OF THE

STATE OF CALIFORNIA.

AN ACT

TO

ESTABLISH A CIVIL CODE.

[Approved March 21st, 1872.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

TITLE OF THE ACT.

1. This Act shall be known as THE CIVIL CODE OF THE STATE OF CALIFORNIA, and is in Four Divisions, as follows: Title and Divisions of this Act.

I.—THE FIRST RELATING TO PERSONS.
II.—THE SECOND TO PROPERTY.
III.—THE THIRD TO OBLIGATIONS.
IV.—THE FOURTH CONTAINS GENERAL PROVISIONS RELATING TO THE THREE PRECEDING DIVISIONS.

THE CIVIL CODE

OF THE

STATE OF CALIFORNIA.

PRELIMINARY PROVISIONS.

2. This Code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three. When this Code takes effect.

California. Laws, statutes, etc.

THE

CIVIL CODE

OF THE

STATE OF CALIFORNIA.

ANNOTATED BY

CREED HAYMOND AND JOHN C. BURCH,

OF THE

CALIFORNIA CODE COMMISSION.

In Two Volumes.

VOL. II.

FIRST EDITION.

SACRAMENTO:
H. S. CROCKER & CO., BOOK AND JOB PRINTERS.
1872.

Copy 1

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PART I.

RELIEF.

TITLE I.

RELIEF IN GENERAL.

Species of relief.

3274. As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this Part of the CIVIL CODE.

NOTE.—When the thing to be done is the payment of money, the remedy is adequate and perfect. But when the thing to be done is anything else than the payment of money, the common law can give only a remedy which may be entirely inadequate; for it can only give a money remedy.—See Parsons on Contracts, Vol. 1, p. 490. Action at law is the remedy for procuring relief or compensation for all damages which are capable of being estimated in money value. Equity actions enforce specific performances, or afford other relief, in all cases where the damages or the acts com-

the injury.—Rudder vs. Price, 1 H. Bl., p. 547; Robinson vs. Bland, 2 Bun., pp. 1077–1086; Co. Litt., p. 257a. A "grossly negligent, willful, or fraudulent breach of duty" will entitle the injured party to vindictive or exemplary damages. These occur usually in actions "*ex delicto*." After a verdict is found for adequate compensation for the injury the jury add thereto their damages by way of punishment.—5 Campbell's Lives of Lord Chancellors, p. 207. Lord Camden remarked that "damages are *designed* not only as a satisfaction to the injured party, but as *a punishment to the guilty*." This is sustained by Sedgwick on Measure of Damages. In the case of Mendelsohn vs. The Anaheim Lighter Co., 40 Cal., p. 657, a common carrier was held liable for punative damages for gross, willful, and tortuous breach of duty, enjoined on him by law as such.

TITLE II.

COMPENSATORY RELIEF.

CHAPTER I.

DAMAGES IN GENERAL.

ARTICLE I.

GENERAL PRINCIPLES.

Cal., p. 21; Pounsett vs. Fuller, 17 C. B., p. 660; 2 Bl. Com., p. 451; 3 id., p. 166; see, also, note to Sec. 3288, ante. The personal right of protection from bodily harm.—See Sec. 43, ante. In Baxter vs. Roberts, Cal. Rep., July Term, 1872, it is held that an employé injured in consequence of a concealment of a fact by his employer may recover damages therefor. This is an important case.

CHAPTER II.

MEASURE OF DAMAGES.

ARTICLE I. DAMAGES FOR BREACH OF CONTRACT.
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ARTICLE I.

DAMAGES FOR BREACH OF CONTRACT.

ponds or fisheries, deer or elk in parks, doves and pigeons in cotes, and the like. There is also a qualified property in birds building in the trees of the owner of the soil, etc., he has a qualified property in their young until they can fly or run away.—2 Bl. Com., pp. 389–394. "Dogs," by Sec. 481, Penal Code, are property, so as to be the subject of larceny. In 1 Hilliard on Torts, pp. 480, 481, it is stated that in conformity with the principles substantially set out in this note, injury to a "dog," although he has no pecuniary value, will sustain an action for trespass. Trover will also lie for a lost "dog" which the defendant having possession of him refuses to deliver, unless paid for his keeping.—Parker vs. Wise, 27 Ala., p. 480; State vs. McDuffie, 34 N. H., p. 523; Wheatley vs. Harris, 4 Sneed, p. 468; McCowis vs. Singleton, 2 Rep. Con. Ct., p. 244. As to trover, see Binstead vs. Buck, 2 W. Black., p. 1117. A statute authorizing the killing of a dog without a collar, is no defense to the action for the conversion of the dog to defendant's use.—Cummings vs. Perham, 1 Met., p. 555.

ARTICLE III.

PENAL DAMAGES.

Failure to quit, after notice.

3344. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.

NOTE.—Stats. 1863, p. 652, Sec. 1161, Code of Civil Procedure, Subd. 1, Sec. 1162, id., defines how notice to be served.—See, also, Secs. 1945, 1946, 1947, ante, and notes.

Tenant willfully holding over.

3345. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such per-

son holding over must pay to the landlord treble rent during the time he continues in possession after such notice.

NOTE.—The same reference as in preceding section; also, Secs. 1162, 1174, Code of Civil Procedure, Cal.; King vs. Connolly, Cal. Reps., July Term, 1872, No. 2957.

Injuries to trees, etc.

3346. For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

NOTE.—The damages for cutting down growing trees are not measured by the value of the trees for firewood, but the injury done to the land by destroying them.—Chipman vs. Hibbard, 6 Cal., p. 162. It is stated in 1 Hilliard on Torts, that it is doubtful whether *trees* or *wood*, owned apart from the land, are real or personal property. In Liford's Case, 11 Co., p. 47, it was held that trees reserved from a conveyance for life passes with a subsequent transfer of the reversion. In Stickely vs. Butler, Hob., p. 10, a grant of trees is said to pass them as chattels, and trespass will lie by the purchaser for injury to them.—See, also, Wright vs. Barrett, 13 Pickering, p. 44; Clap vs. Draper, 4 Mass., p. 266; Sawyer vs. Hammate, 3 Shepl., p. 40; Putney vs. Day, 6 N. H., p. 430. It is competent for one to take by purchase trees standing on land of another, with the right of entry to cut and to sell the trees, wholly or in part, with a joint right of entry, etc.—Huskin vs. Ricord, 32 Vt., p. 575. The *presumption* is that growing trees belong to the owner of the soil; but in Gronour vs. Daniels, 7 Blackf., p. 108, it was held that it was not necessary to aver ownership of the soil to maintain trespass done by cutting down trees alleged to be the property of the plaintiff. And this is consonant with the rule set out in 1 Hill Real Property, p. 10, that trees standing on and rooted in the soil of one person may be owned by another, and that though

the limbs overhang another's ground, they belong to the owner of the root; and the same with regard to roots extending into the soil of another. The whole tree, with its fruit, belongs to the owner of the soil where the tree stands.—1 Swift, p. 104; Addi. on Wrongs, p. 154. When a tree is exactly on the line dividing two owners' lands they are tenants in common of the tree, and each has an action against any one, even his co-tenant, for injury to it.—2 Rolle Rep., p. 255; Griffin vs. Bixley, 12 N. H., p. 454.

Injuries inflicted in a duel.

3347. If any person slays or permanently disables another person in a duel in this State, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance, to be determined by the Court.

NOTE.—This section is based on Stats. 1855, p. 152. Art. XI, Sec. 2, of our State Constitution, prohibits any one who fights, or acts as second, or knowingly aids or assists one who fights a duel or sends a challenge to fight a duel, from holding any office of profit or trust. See, also, Secs. 225 to 232, Penal Code of California.

Same.

3348. If any person slays or permanently disables another person in a duel in this State, the slayer is liable for and must pay all debts of the person slain or permanently disabled.

NOTE.—Based on Stats. 1855, p. 152.

ARTICLE IV.

GENERAL PROVISIONS.

SECTION 3353. Damages to be reasonable.
3360. Nominal damages.

Value, how estimated in favor of seller.

3353. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

NOTE.—Obviously, a seller can sustain no injury by reason of any peculiar value of the thing sold. Its value is that which it bears in the nearest market (see Gregory vs. McDowell, 8 Wend., p. 435), and the time reasonable in which to effect a resale.—Loder vs. Kekulé, 3 C. B. (N. S.), p. 128; see Simons vs. Patchett, 7 E. & B., p. 568; see, also, notes to Secs. 3308, 3309, 3310, ante. It is stated in 1 Hilliard on Torts, p. 133, Sec. 27, that the law relative to the measure of damages for conversion cannot be considered as well settled. In general terms, the *value of the property* is the standard, says Hilliard; referring to several authorities to support this view (id., Note 24); "but as to the elements which constitute that value, different cases adopt in many respects widely different views." The points on which this author finds the law unsettled are: the *time* at which the value is estimated, or, in other words, the *profits* which plaintiff lost; how far *detention* entered into the question of *loss of profits*, or the *amount paid for the hire* of others of the same kind, referring to numerous cases thereon. "So whether the peculiar value of the property to the *plaintiff* arising from personal considerations is to be estimated in the damages, as in case of a family picture." In support of the author's view, he refers to numerous cases in Note 1, p. 134. There are also other unsettled questions there referred to, most of which it is the purpose of Chap. II, Title I, Part I, Div. IV of this Code to settle, as is partly done in the text of Sec. 3355, post.

Value, how estimated in favor of buyer.

3354. In estimating damages, except as provided by Sections 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

NOTE.—*Value to buyer or owner.*—It will be found that there is no distinction between the buyer and the owner of goods in respect to the matters to which this section relates. The value is the *price in the market.*—Havemeyer vs. Cunningham, 35 Barb., p. 515; Smith vs. Griffith, 3 Hill, p. 333; King vs. Orser, 4 Duer, p. 481; Davis vs. Shields, 24 Wend., p. 322; 26 id., p. 341; see Lawrence vs. Wardwell, 6 Barb., p. 423; Comstock vs. Hutchinson, 10 id., p. 211; Gerard vs. Prouty, 84 id., p. 454; Hamilton vs. Ganyard, id., p. 204; Muller vs. Eno, 14 N. Y., p. 597; M'Knight vs. Dunlop, 5 id., p. 537; Dana vs. Fiedler, 12 id., p. 40; Stevens vs. Low, 2 Hill, p. 182; Cary vs. Gruman, 4 id., p. 625. Or at which a similar thing could be bought. The price at which a purchase could have been made is alone to be regarded, even though the purchaser bought for speculation, and could not have sold again at such a price.—Dana vs. Fiedler, 12 N. Y., p. 40. "*The market*" is that nearest where possession was to be given.—Gregory vs. McDowell, 8 Wend., p. 435. And reasonable time allowed in which with diligence to make the purchase.—Josling vs. Irvine, 6 H. & N., p. 512; see Loder vs. Kekulé, 3 C. B. (N. S.), p. 128. The rule usually stated is that the buyer can recover only the price of the day upon which delivery ought to have been made.—Dana vs. Fiedler, 12 N. Y., p. 40; Clark vs. Dales, 20 Barb., p. 42; Belden vs. Nicolay, 4 E. D. Smith, p. 14; Davis vs. Shields, 24 Wend., p. 322; 26 id., p. 341; Gregory vs. McDowell, 8 id., p. 435; Tempest vs. Kilner, 3 C. B., p. 249; see Peterson vs. Ayre, 13 id., p. 353. But the question discussed in Josling vs. Irvine was not raised in these cases. See, also, notes to Secs. 3308–3310, ante.

Property of peculiar value.

3355. Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer.

NOTE.—Suydam vs. Jenkins, Sandf., pp. 614-621; see, also, note to Sec. 3353, ante; 1 Hilliard on Torts, pp. 133, 134, Sec. 27; Butler vs. Hicks, 11 Sm. & M., p. 78; Hall vs. Clark, 11 id., p. 187; Dennis vs. Barber, 6 S. & R., p. 420; Berry vs. Vantries, 12 id., p. 89; Taylor vs. Morgan, 3 Watts, p. 333; Hagar vs. McMains, 4 id., p. 418. See Sec. 2230, post, and note, as to property having "peculiar value."

Value of thing in action.

3356. For the purpose of estimating damages, the value of a thing in action is presumed to be equal to that of the property to which it entitles its owner.

NOTE.—So held as to a note (Decker vs. Mathews, 12 N. Y., p. 313; Ingalls vs. Lord, 1 Cow., p. 240), or other debt (Thomas vs. Dickinson, 12 N. Y., p. 364; S. C., again, 22 Barb., p. 491), or an agreement to convey land.—Clowes vs. Hawley, 12 Johns., p. 484. This presumption is not conclusive.—Allen vs. Suydam, 20 Wend., p. 321; Ingalls vs. Lord, 1 Cow., p. 240; see Thomas vs. Dickinson, above cited.

Damages allowed in this Chapter, exclusive of others.

3357. The damages prescribed by this Chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned.

NOTE.—Examine note to Sec. 3353, ante, as to purposes of this Chapter.

Limitation of damages.

3358. Notwithstanding the provisions of this Chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the Articles on Exemplary Damages and Penal Damages, and in Sections 3319, 3339, and 3340.

NOTE.—This is an established principle of equity (Skinner vs. White, 17 Johns., p. 357; rev'g S. C., 2 Johns. Ch., p. 529), which, since the union of law and equity, should be recognized as a rule of damages. See a decision upon a similar question in Russell vs. Roberts, 3 E. D. Smith, p. 318; see notes to sections referred to in the text.

Damages to be reasonable.

3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

NOTE.—James vs. Morgan, 2 Levinz, p. 111; Thornborow vs. Whitacre, 2 Ld. Raym., p. 1164. In the first case, the defendant had agreed to pay, for a horse sold to him, a farthing for his first shoe nail, two farthings for the second, four for the third, and so on, for the thirty-two nails in the horse's shoes. This, of course, amounted to many thousand pounds sterling, for which the plaintiff sued. But the Court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case, a somewhat similar bargain was entered into, the damages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the Court was, at first, about to give judgment for the whole sum demanded; but on *amicus curiæ* mentioning the case of James vs. Morgan, the action was settled, under an intimation of the Court, by the repayment of the consideration received for the contract (2s. 6d.), and costs. The rule of the text is fully sustained by that broad and general rule to which frequent allusion is made in this Chapter "that *compensation* is the principle which is the foundation of the measurement of all damages." This principle, it is contended, we believe universally, to be none the less true because there are difficulties in its application, nor because it is an undisputed fact that but few law suits for compensatory damages terminate in rendering exact or adequate compensation for the injury. The Courts are daily approaching more nearly a strict application of this rule, and as a necessary consequence are disposed to allow judgments in conformity with the *obligations* and the *proofs*, the "*ad damnum*" alone being the absolute limit.

Nominal damages.

3360. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

NOTE.—Hamlin vs. Gt. North. Rail. Co., 1 H. & N., p. 406; Marzetti vs. Williams, 1 B. & Ad., p. 416. No damages, nominal or otherwise, are allowed in two classes of cases: first, in legal parlance, where there is "*injuria*

sine damno;" and, second, where there is "*damnum absque injuria.*" The first is where there is a *wrong* done without producing that result which the law recognizes as *damage;* and the second is where there is a *wrong done* for which there is no *legal remedy;* which is the case when the law authorizes one person to do a thing certain, which, when done as the law directs, injures another or his property.—Barbier vs. Police Jury, 15 La. An., p. 541. Nominal damages are frequently rendered in actions instituted (as is often done in this State in mining and other cases) to establish a right or to settle a claim or title. So, also, they are awarded in such actions as slander, libel, and the like, when a wrong has been done but no appreciable damage resulted to plaintiff.—Webb vs. Portland Manuf. Co., 3 Sumner, pp. 189-192, in which Story, J., treats of this subject at considerable length, and refers to the great case of Ashby vs. White, 2 Ld. Raym., p. 938; 6 Mod., p. 45; Holt, p. 524. Lord Holt's opinion in this case was sustained by the House of Lords, and that of his brethren overthrown. In a subsequently printed copy of this opinion, Lord Holt says: "It is impossible to imagine any such thing as an '*injuria sine damno.*' Every injury imparts damage in the nature of it." B. R. and A. Water and Mining Co. vs. New York Mining Co., 8 Cal., p. 327; Weaver vs. Eureka Lake Co., 15 Cal., p. 271.

TITLE III.

SPECIFIC AND PREVENTIVE RELIEF.

CHAPTER I.

GENERAL PRINCIPLES.

3366. Specific or preventive relief may be given in the cases specified in this Title, and in no others. Specific relief, etc. when allowed.

3367. Specific relief is given: Specific relief, how given.

1. By taking possession of a thing, and delivering it to a claimant;

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

NOTE.—*Subd.* 1.—This includes the ordinary remedies in the common law actions of ejectment and replevin, or as they may be called under the Code, actions for land, and actions for chattels.

Subd. 2.—This includes the specific performance of contracts, the delivery of things wrongfully detained, the surrender of instruments to be canceled, etc.

Subd. 3.—This includes all cases in which a right is determined, without ulterior measures. Thus a contract may be declared void, although the instrument containing it is lost; a judgment may be annulled for fraud; the occupant of land may be declared to have a good title as against a claimant who does not himself sue, etc.—See note to Secs. 3380, and note, and 3384, post, on specific performance; and Title X, Chaps. I-VI, inclusive, of Part II of the Code of Civil Procedure; also, Part III of id., "of special proceedings of a civil nature." As particularly in point, Sec. 667 (¶ 200), Co. of Civ. Pro. Cal., embodying what has been known as the Specific Contract Act, as also other similar provisions is referred to. *Construction of Act.* Constitutional.—Galland vs. Lewis, 26 Cal., p. 46. Applicable to contract made before as well as after its passage.—Otis vs. Haseltine, 27 Cal., p. 80. Simply provides a remedy for enforcing legal contracts.—Lane vs. Gluckauf, 28 Cal., p. 238. *What is not gold coin contract.*—Lamping & Co. vs. Hyatt, 27 Cal., p. 99. Special deposit on which by subsequent contract interest is agreed to be paid and received, loses its character of special deposit.—Howard vs. Robon, 38 Cal., p. 399. One partner may bind firm in specific contract.—Meyer vs. Kohn, 29 Cal., p. 273. Accounts with memorandum payable in gold coin, signed by defendant, is evidence

Exc:
Art. III & IV

[Repealed, &c.]

REVISED LAWS

OF THE

STATE OF CALIFORNIA;

IN FOUR CODES:

POLITICAL, CIVIL, CIVIL PROCEDURE AND PENAL.

CIVIL CODE.

SACRAMENTO:
D. W. GELWICKS, STATE PRINTER.
1871.

PREFACE.

This, the CIVIL CODE, must, in the main, speak for itself. There is so much urgent labor to be performed by the Commission before the meeting of the Legislature, that a more elaborate exposition must be left to a future occasion. It contains four grand Divisions. These are divided into Parts, Parts into Titles, Titles into chapters, chapters into articles, and the *whole* is sectionized consecutively, from the beginning to the end of the Code. Sections have been left in blank at the end of each chapter and article, for future declaration of rules or amendments.

Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States—"American Common Law;" the Common Law of England, as *modified* by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subjects differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

This "unwritten" law is a system quite complete, but its *expression* is most fragmentary. It is found scattered throughout thousands of volumes of English and American reports and digests, from the Year Books down to the present time. The Civil Law, with Mexican modifications, prevailed in this State up to the time of the adoption of the Common Law. The history of civilization does not furnish a parallel, of placing upon a conquered people a whole system of "unwritten" laws, foreign to them and their language, and which could only be found by searching out its disintegrated elements. The Legislature has never provided for a translation of the Common Law into Spanish. The citizen and the lawyer alike complain over the want of a condensed methodical expression of the law. The Civil Code of New York—a monument of legal wisdom and patient industry—is a collection of Common Law rules and principles, combined with a consolidation of statutes like our own, all concisely stated, logically and harmoniously arranged, in order of subjects corresponding to Blackstone's Commentaries. We "supply the defect" in our Act adopting the Common Law, by specifying the general rules already embraced in its very general terms, and for this purpose avail ourselves of the exhaustive labors of the New York Commission. Most of our statutes have been taken, from time to time, from sister States, and mostly from New York. The chapters on *Special Partnerships* (Stats. 1870, 123) and *Adoption of Children* (Stats. 1870, 530) were taken bodily from the Civil Code of New York.

The sharp lines between statute law and the Common Law, remaining unexpressed in Code form, are toned down. The Code and the Common Law are but harmonious parts of one system, differing only in name—in the terms employed, indicating the different modes of adoption.

The work of revising such of our statutes as pertain to this Code, and giving them conciseness in harmony with the general style of that Code, and of incorporating them in their appro-

priate places, has been performed with all reasonable care. The law on marriage and divorce has been more fully declared; the distinction between sealed and unsealed instruments has been abolished; married women authorized to convey separate property without the signatures of their husbands; conveyances and acknowledgments simplified, and all parts of the Code made to harmonize with these changes. It is believed that in the main the work is well done. Doubtless some defects or omissions will be discovered on final examination after printing as a whole, which the Commission, Committee or Examining Board will correct before presentation to the Legislature in bill form.

The Code can be considered and be accepted or rejected as a *whole*, or those Acts of our statutes which have been revised and incorporated into the Code can be considered and passed by themselves. The Legislature can take its choice as between the *whole* volume or the revised Titles from the statutes. Alternate bills can be prepared to carry out either plan. Those who choose to follow the Commission through this Code should obtain a copy of the New York Civil Code, as a better means of testing the accuracy of our work. Its numerous references to leading cases, in which the particular principle declared has been adjudicated, and the copious notes, afford the highest guarantee of the correctness of that work.

We make acknowledgments to Judges O. C. Pratt, S. H. Dwinelle, E. D. Sawyer and T. Reed; also, to Messrs. Williams and Thornton, S. Wilson and J. B. Harmon, for examinations and suggestions concerning some portions of the work.

CHARLES LINDLEY,
JNO. C. BURCH,
CREED HAYMOND,
Commissioners.

OFFICE REVISION COMMISSION,
Sacramento, October 2d, 1871.

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CIVIL CODE

OF THE

STATE OF CALIFORNIA.

IN FOUR DIVISIONS.

THE

CIVIL CODE

OF THE

STATE OF CALIFORNIA.

AN ACT

TO ESTABLISH A CIVIL CODE.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. This Act shall be known as the CIVIL CODE OF THE STATE OF CALIFORNIA. Title of Code

When to take effect.

SEC. 2. This Code shall take effect on the ——— day of ———, eighteen hundred and seventy-two, at twelve o'clock, noon.

N. Y. C. C., Sec. 2034.

Definition of law.

SEC. 3. Law is a rule of property and of conduct, prescribed by the supreme power of the State.

N. Y. C. C., Sec. 2.

Action of sovereign power.

SEC. 4. The will of the sovereign power is expressed—

1. By the Constitution, which is the organic Act of the people.

2. By statutes, which are the Acts of the Legislature, or by the ordinances of other and subordinate legislative bodies.

N. Y. C. C., Sec. 5.

The common law rule the rule of decision.

SEC. 5. The Common Law, as expressed in the decisions of the English and American Courts, and shown in the records, reports and digests thereof, is the rule of decision in all the Courts of this State.

[New section.] Stats. 1850, 219.

NOTE.—Our Act, adopting the common law of England (Stats. 1850, 219), is as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State."

A strict construction of the words "common law of England," would have required Courts to follow the English rule, when in conflict with the American; yet it is believed that the latter has had a greater influence in our jurisprudence than the former. The phrase "common law which is expressed in the decisions of the English and American tribunals," extends the latter so as to include the whole body of the common law, whether found in English or American decisions, and makes it conformable to the construction of that Act.

Cool. Bl. Comm., I, 67, note 3, is as follows:

"The common law includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature. (1 Kent, 468.) The common law of the American States consists of the common law of England, as modified by English statutes previous to the colonization of America, so far as it has been found adapted to our altered condition and circumstances. And those English statutes passed afterwards, at any time prior to the Revolution, which were practically accepted and adopted in America, became also a part of American common law. (See Van Ness vs. Packard, 2 Pet., 144; also, other authorities therein cited.)"

Two kinds of common law

SEC. 6. The Common Law is divided into—
1. Public law, or the law of nations.
2. Domestic or municipal law.

N. Y. C. C., Sec. 4.

NOTE.—Cool. Bl. Comm., I, 69, note 3, is as follows:

"Of the United States, as a nation, there is no common law. The Federal Government is composed of sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law would be made a part of our federal system only by legislative adoption. (McLean, J., in Wheaton vs. Peters, 8 Pet., 653, and other authorities therein cited.)"

No common law, where the law is declared by this Code.

SEC. 7. There is no Common Law in any case where the law is declared by this Code.

N. Y. C. C., Sec. 6.

Two kinds of civil rights.

SEC. 8. All original civil rights are either—
1. Rights of person; or,
2. Rights of property.

N. Y. C. C., Sec. 7.

Rights, how modified.

SEC. 9. Rights of person and of property may be waived, surrendered or lost by neglect, in the cases provided by law.

N. Y. C. C., Sec. 8; Conkling vs. King, 10 N. Y., 440.

Divisions of this Code.

SEC. 10. This Code has four general divisions:
1. The first relates to PERSONS.
2. The second, to PROPERTY.
3. The third, to OBLIGATIONS.
4. The fourth contains general provisions relating to PERSONS, PROPERTY and OBLIGATIONS.

N. Y. C. C., Sec. 9.

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II. SPECIAL RELATIONS OF DEBTOR AND CREDITOR.
III. NUISANCE.
IV. MAXIMS OF JURISPRUDENCE.
V. DEFINITIONS AND GENERAL PROVISIONS.

PART I.

RELIEF.

TITLE I.

RELIEF IN GENERAL.

Species of relief.

SEC. 3274. As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this Part of the CIVIL CODE.

N. Y. C. C., Sec. 1930.

Relief in case of forfeiture.

SEC. 3275. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful or fraudulent breach of duty.

Though this doctrine, especially as applied to contracts, is one in its origin of purely equitable cognizance, it is now to be applied in all actions, and to be considered in estimating damages, as well as in granting specific relief (see Spaulding vs. Hallenbeck, 39 Barb., 78).

N. Y. C. C., Sec. 1931.

TITLE II.

COMPENSATORY RELIEF.

CHAPTER I.

DAMAGES IN GENERAL.

ARTICLE I.

GENERAL PRINCIPLES.

Person suffering detriment may recover damages.

SEC. 3281. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

N. Y. C. C., Sec. 1832.

Detriment, what.

SEC. 3282. Detriment is a loss or harm suffered in person or property.

This word is used in order to avoid the repetition of the words "loss or harm" in the numerous places in which they must otherwise occur. Injury signifies the wrongful act, and not its results, while on the other hand there may be loss without injury. The phrase "*damnum absque injuria*," is familiar to lawyers. The word "harm" alone would be inadequate to express all the meaning of "loss."

N. Y. C. C., Sec. 1833.

Injuries resulting or probable after suit brought.

SEC. 3283. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.

N. Y. C. C., Sec. 1834.

Exemplary damages, in what cases allowed.

SEC. 3294. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

In this the Commissioners have taken the rule as now settled in this State by the Court of Appeals (Hunt vs. Bennett, 19 N. Y., 173; and see Johnson vs. Jenkins, 24 N. Y., 252; Fry vs. Bennett, 1 Abb. Pr., 259; 4 Duer, 247; Brown vs. Chadsey, 30 Barb., 253, 259; Sharon vs. Mosher, 17 Barb., 518). The propriety of allowing damages by way of punishment has been, however, very earnestly and ably questioned. See the discussion of this subject in Sedgwick on Dam., 3d ed., Chap. 18, and especially p. 477, note 2; and Appendix.

N. Y. C. C., Sec. 1339.

NOTE.—The same rule prevails in this State. (Wilson vs. Middleton, 2 Cal., 54; Nightingale vs. Scannell, 18 Cal., 315; Dorsey vs. Manlove, 14 Cal., 553.

CHAPTER II.

MEASURE OF DAMAGES.

ARTICLE I. DAMAGES FOR BREACH OF CONTRACT.
II. DAMAGES FOR WRONGS.
III. PENAL DAMAGES.
IV. GENERAL PROVISIONS.

ARTICLE I.

DAMAGES FOR BREACH OF CONTRACT.

Breach of promise of marriage.

SEC. 3329. The damages for the breach of a promise of marriage rest in the sound discretion of the jury.

Southard vs. Rexford, 6 Cow., 254; see Johnson vs. Jenkins, 24 N. Y., 252.

N. Y. C. C., Sec. 1859.

ARTICLE II.

DAMAGES FOR WRONGS.

SECTION 3333. Breach of obligation other than contract.
3334. Wrongful occupation of real property.
3335. Wilful holding over.
3336. Conversion of personal property.
3337. Same.
3338. Damages of lienor.
3339. Seduction.
3340. Injuries to animals.

Breach of obligation other than contract.

SEC. 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

N. Y. C. C., Sec. 1860.

Wrongful occupation of real property.

SEC. 3334. The detriment caused by the wrongful occupation of real property, in cases not embraced in Secs. 3336, 3344, 3345 and 3346, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

N. Y. C. C., Sec. 1861.

Wilful holding over.

SEC. 3335. For wilfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

N. Y. C. C., Sec. 1862.

Conversion of personal property.

SEC. 3336. The detriment caused by the wrongful conversion of personal property, is presumed to be—

1. The value of the property at the time of the conversion, with interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,

2. A fair compensation for the time and money properly expended in pursuit of the property.

N. Y. C. C., Sec. 1863.

Same.

SEC. 3337. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent.

N. Y. C. C., Sec. 1864.

Damage of lienor.

SEC. 3338. One having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by Sec. 3336 for loss of time and expenses.

N. Y. C. C., Sec. 1865.

Seduction.

SEC. 3339. The damages for seduction rest in the sound discretion of the jury.

N. Y. C. C., Sec. 1866.

Injuries to animals.

SEC. 3340. For wrongful injuries to animals, being subjects of property, committed wilfully, or by gross negligence, in disregard of humanity, exemplary damages may be given.

N. Y. C. C., Sec. 1867.

ARTICLE III.

PENAL DAMAGES.

SECTION 3344. Failure to quit, after notice.
3345. Tenant wilfully holding over.
3346. Forcible exclusion from possession of real property.
3347. Injuries to trees, etc.
3348. Injuries inflicted in a duel.
3349. Same.

Failure to quit, after notice.

SEC. 3344. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay.

N. Y. C. C., Sec. 1868.

Tenant wilfully holding over.

SEC. 3345. For wilfully holding over real property, by a tenant, after the end of his term, and after notice to quit has been duly given, and demand of possession made, the measure of damages is double the yearly value of the property, for the time of withholding, in addition to compensation for the detriment occasioned thereby.

N. Y. C. C., Sec. 1869.

NOTE.—Secs. 791 and 792 of this Code must be substituted for the two preceding sections, before adoption. Their sameness of subject and difference of locality was discovered too late to remedy in this print—one of the little accidents in revision.

Forcible exclusion from possession of real property.

SEC. 3346. For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

N. Y. C. C., Sec. 1870.

NOTE.—Change Sec. 1174 (C. C. P.) to correspond with the three preceding sections, or change these sections to correspond with that.

Injuries to trees, etc.

SEC. 3347. For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

N. Y. C. C., Sec. 1871.

Injuries inflicted in a duel.

SEC. 3348. If any person slays or permanently disables another person in a duel in this State, the slayer shall provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a

monthly, quarterly or annual allowance, to be determined by the Court.

[New section.] Based on Stats. 1855, 162.

Same.

SEC. 3349. If any person slays or permanently disables another person in a duel in this State, the slayer shall be liable for and shall pay all debts of the person slain or permanently disabled.

[New section.] Based on Stats. 1855, 162.

ARTICLE IV.

GENERAL PROVISIONS.

Value, how estimated in favor of seller.

SEC. 3353. In estimating damages, the value of property, to a seller thereof, is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

N. Y. C. C., Sec. 1872.

Value, how estimated in favor of buyer.

SEC. 3354. In estimating damages, except as provided by Secs. 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

N. Y. C. C., Sec. 1873.

Property of peculiar value.

SEC. 3355. Where certain property has a peculiar value to a person recovering damages for deprivation

thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a wilful wrong-doer.

N. Y. C. C., Sec. 1674.

Value of thing in action.

SEC. 3356. For the purpose of estimating damages, the value of a thing in action is presumed [prima facie] to be equal to that of the property to which it entitles its owner.

N. Y. C. C., Sec. 1675.

NOTE.—The words "prima facie" have been inserted in the text of the New York Civil Code, to avoid the doubt as between conclusive and prima facie presumptions.

Damages allowed in this chapter, exclusive of others.

SEC. 3357. The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned.

N. Y. C. C., Sec. 1676.

Limitation of damages.

SEC. 3358. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on *Exemplary Damages* and *Penal Damages*, and in Secs. 3329, 3330 and 3340.

This is an established principle of equity (Skinner vs. White, 17 Johns., 357; rev'g S. C., 2 Johns. Ch., 320), which, since the union of law and equity, should be recognized as a rule of damages. See a decision upon a similar question in Russell vs. Roberts, 3 E. D. Smith, 318.

N. Y. C. C., Sec. 1677.

Damages to be reasonable.

SEC. 3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

James vs. Morgan, 2 Levinz, 111; Thornborow vs. Whitacre, 2 Ld. Raym., 1164. In the first case, the defendant had agreed to pay, for a horse sold to him, a farthing for his first shoe nail, two farthings for the second, four for the third, and so on, for the thirty-two nails in the horse's shoes. This, of course, amounted to many thousand pounds sterling, for which the plaintiff sued. But the Court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case, a somewhat similar bargain was entered into, the dam-

ages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the Court was, at first, about to give judgment for the whole sum demanded; but on *curiæ cavia* mentioning the case of James vs. Morgan, the action was settled, under an intimation of the Court, by the repayment of the consideration received for the contract (2s. 6d.), and costs.

N. Y. C. C., Sec. 1678.

Nominal damages.

SEC. 3360. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

N. Y. C. C., Sec. 1679.

TITLE III.

SPECIFIC AND PREVENTIVE RELIEF.

CHAPTER I. GENERAL PRINCIPLES.
II. SPECIFIC RELIEF.
III. PREVENTIVE RELIEF.

CHAPTER I.

GENERAL PRINCIPLES.

Specific relief, etc., when allowed.

SEC. 3366. Specific or preventive relief may be given in the cases specified in this Title, and in no others.

N. Y. C. C., Sec. 1680.

Specific relief, how given.

SEC. 3367. Specific relief is given—

1. By taking possession of a thing, and delivering it to a claimant.

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

The first includes the ordinary remedies in the common law actions of ejectment and replevin, or, as they may be called under the Code, actions for land and actions for chattels.

Exc. CC:
Art III + IV

THE

CIVIL CODE

OF THE

INV. 1898.

STATE OF NEW YORK.

REPORTED COMPLETE

BY THE

New York (C.C.)

COMMISSIONERS OF THE CODE.

ALBANY:
WEED, PARSONS & CO., PRINTERS.
1865.

TO THE LEGISLATURE

OF THE

STATE OF NEW YORK:

The Commissioners of the Code, appointed by the Act of ril 6, 1857, having completed their labors, beg leave to ke this their NINTH and final

REPORT.

ey have already reported, from time to time, the various s taken by them in the progress of their work. Their , it will be remembered, as expressed in the act by which were appointed, was "to reduce into a written and sys- atic Code the whole body of the law of this State, or so h and such parts thereof as shall seem to them practicable expedient, excepting always such portions of the law as been already reported upon by the Commissioners of ctice and Pleadings, or are embraced within the scope heir reports." This work was to be divided into three ions; one containing the Political Code, another the Civil e, and a third the Penal Code.

he Codes of Civil and Criminal Procedure, as reported plete by the Commissioners on Practice and Pleadings, designed to embrace all the law of this State, respecting edies in the judicial tribunals, civil and criminal, includ- the law of evidence. There then remained the vast body ubstantive law; that is to say, the law of civil rights and ations affecting all the transactions of men with each in their private relations, the law of crimes and punish- ts, and the law of government, including every branch

of administrative and political action. This body of substantive law, the Legislature, by the act of 1857, declared should be contained in the three Codes—Political, Civil and Penal, and to them the Commissioners of the Code have ever since devoted themselves.

Their first act was to prepare and report to the Legislature a general analysis of the Codes projected by them. After this their efforts were next directed to the preparation of the Political Code. This was divided into four parts. The first declared what persons composed the people of the State, and the political rights and duties of all persons subject to its jurisdiction; the second defined the territory of the State and its civil divisions; the third related to the general government of the State, the functions of its public officers, its general police and civil polity; and the fourth related to the local government of counties, cities, towns and villages. The draft having been made, was distributed among the judges and other competent persons for examination; and after that the Commissioners re-examined their work and considered such suggestions as had been made to them, and the whole, as finally agreed upon by them, was reprinted and distributed to the judges and other officers before being presented to the Legislature. The Political Code, thus drawn and revised, was presented to the Legislature on the 10th of April, 1860.

A few days afterwards, by an act passed on the 16th of April, 1860, they were requested to prepare a Book of Forms adapted to the Code of Civil Procedure. This duty was performed by them, and the required Forms were submitted to the Legislature on the 30th of March, 1861.

On the 5th of April, 1862, the Commissioners having prepared the draft of the Civil Code, distributed it to the judges and others for examination, and on the 2d of April, 1864, they in like manner distributed the draft of the Penal Code.

Having re-examined these two Codes and considered such suggestions as had been made, they have finally revised and agreed upon them.

The Penal Code is herewith laid upon the tables of the Members of the Senate and Assembly. The Civil Code is in the hands of the printer and will shortly be completed and in

like manner furnished to the members of the two houses. But as the term of office of the Commissioners will expire before the close of the present session of the Legislature, it is not possible to make the required distribution among the judges, surrogates and county clerks in time for the more formal presentation of the Civil and Penal Codes to the Legislature for adoption.

The Penal Code, thus prepared, defines all the crimes for which, according to the law of this State, persons can be punished, and the punishment for the same. In preparing it the Commissioners kept the following objects in view: first, to bring within the compass of a single volume the whole body of the law of crimes and punishments; second, to supply deficiencies and correct errors in the present definitions of crimes; third, to make the relative degrees of punishment more nearly equal to the relative degrees of crime; and fourth, to define and punish acts deserving of punishment, but not punishable by the existing law.

The Civil Code was required to embrace the laws of personal rights and relations, of property and of obligations.

It has four general divisions: the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions relating to these different subjects. In the execution of this vast undertaking, the commissioners have endeavored to bring together and arrange in order, all the general rules known to our law upon the subjects contained within the scope of such a Code, rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable.

The first division, it will be seen, defines the civil condition of different persons in the State, adults, minors, persons of unsound mind and Indians; enumerates their personal rights; declares their personal relations, under the various topics of marriage, divorce, husband, wife, parent, child, guardian, ward, master and servant.

The second division contains the laws respecting property, real and personal, the various interests or estates therein, the modes of acquisition by occupancy, accession, transfer, will or

succession; the restrictions on alienation and accumulation, the conditions and qualifications of ownership; uses and powers; the making, interpretation and execution of wills, and various special provisions relating to corporations, copyright, shipping, and the rules of navigation. The third division embraces the whole subject of obligations, whether arising from contract or the operation of law, their definition, interpretation, transfer and extinction, whether by performance, offer of performance, prevention of performance or otherwise; the object and consideration of contracts, the parties thereto and their consent, whether freely given or obtained by duress, menace, fraud, undue influence or mistake; and after these general subjects, the particular subjects are considered of sale, exchange, deposit, loan, hiring, employment, service, carriage, trust, agency, partnership, insurance, indemnity, suretyship, pledge, mortgage, lien and commercial paper. The fourth division specifies the different kinds of relief afforded for the violation of private rights, and the means of securing their observance, whether compensatory, specific, or preventive, and the measure of damages when compensation is the rule. This division contains, also, provisions concerning the special relations of debtor and creditor, and concerning nuisances, and enumerates and explains various maxims of jurisprudence.

In all this immense range of subjects, while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to "specify such alterations and amendments therein as they shall deem proper." In obedience to this command of the organic law, they have specified various alterations and amendments which they consider proper to be adopted. These are mentioned in the notes to the different sections, where the reasons for recommending them are generally given.

For all these the Commissioners beg leave to refer to the notes themselves. To detail them here would swell this report to an inconvenient length, and, therefore, three only will be mentioned. In the first division the Commissioners have endeavored to secure the equal rights of married women in respect to their children and their property, abolishing at

the same time both dower and curtesy, and they have introduced an article on adoption, by which they have provided that the substituted parent may have all the rights and be subject to all the responsibilities of the real one, who, having once voluntarily renounced his parental rights, should not be permitted to resume them when the affections have grown into the new relation. In the second division the Commissioners have aimed at an assimilation to the utmost extent possible of the laws of real and personal property, by reducing the law of real estate to the simplicity of personal, wherever it could be done without the disturbance of existing rights, establishing for both the same rules of succession.

The Commissioners will not presume to think that in the preparation of the Codes they have foreseen all the cases which can arise in the multifarious affairs of men, or that they have even collected all the general rules which have been announced from the bench in the past history of our law. Some may have been overlooked, some may have been omitted from a mistaken belief that they were obsolete or inapplicable to our present condition, or were contrary to other rules of greater importance that ought to be retained.

All that the Commissioners profess is, that they have endeavored to collect those general rules known to our law which are applicable to our present circumstances, and ought to be continued. They trust that they have arranged these rules in a manner which will be approved by the scientific student, while it will help the lawyer and the citizen to an easier if not a better knowledge of the law. And they flatter themselves that for the unforeseen cases which are certain to arise, there are general principles, rules of interpretation and analogies which will serve as guides for judicial decision.

The question whether a Code is desirable is simply a question between written and unwritten law.

That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known, and if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws. The same rea-

shall effect half the good which the Commissioners have ventured to hope from it, and the thought of which has cheered them through their long task, they will be rewarded.

The Codes which the Commissioners have thus prepared, together with the Codes of Civil and Criminal Procedure heretofore submitted by the Commissioners on Practice and Pleadings, complete that work of codification which was contemplated by the Constitution of 1846; and, when the same shall have been considered and sanctioned by the Legislature, the people of New York will have the whole body of their laws in a written and systematic form, as full, at least, the Commissioners venture to think, as the code of any other people.

In the last months of their service, when their task was well nigh ended, and while the sheets of the Civil Code were passing through the press, one of the members of the Commission was taken away by death. On the 25th of December, 1864, after an illness of two days, Mr. NOYES died, to the inexpressible grief of his associates; having been suddenly struck down in the fullness of life, leaving to the surviving Commissioners the mournful duty of signing their names, without his, to this last report of their common labors.

All which is respectfully submitted.

DAVID DUDLEY FIELD.
ALEX. W. BRADFORD.

NEW YORK, February 13th, 1865.

INTRODUCTION.

THE Civil Code mentioned in the preceding report, is contained in this volume. Its history is as follows: The Constitution of the State of New York, as revised and adopted in 1846, has two provisions looking to a codification of the laws. One is the 17th section of the first article, in these words:

"The Legislature at its first session after the adoption of "this Constitution, shall appoint three Commissioners whose "duty it shall be to reduce into a written and systematic "Code, the whole body of the law of this State, or so "much and such parts thereof as to the said Commissioners "shall seem practicable and expedient; and the said Com- "missioners shall specify such alterations and amendments "therein as they shall deem proper, and they shall at all "times make reports of their proceedings to the Legisla- "ture when called upon to do so; and the Legislature shall "pass laws regulating the tenure of office, the filling of "vacancies therein, and the compensation of said Com- "missioners, and shall also provide for the publication of "the said Code, prior to its being presented to the Legis- "lature for adoption."

The other is the 24th section of the 6th article. "The "Legislature at its first session after the adoption of this

"Constitution, shall provide for the appointment of three "Commissioners, whose duty it shall be to revise, reform, "simplify and abridge the rules and practice, pleadings, "forms and proceedings of the courts of record of this "State, and to report thereon to the Legislature, subject to "their adoption and modification from time to time."

Both Commissions were filled by an act passed on the 8th of April, 1847; that under the 1st article by the appointment of REUBEN H. WALWORTH, ALVAH WORDEN and JOHN A. COLLIER, as "Commissioners of the Code," to hold office for two years; and that under the 6th article, by the appointment of ARPHAXED LOOMIS, NICHOLAS HILL, Jr., and DAVID GRAHAM, as "Commissioners on Practice and Pleadings," to hold office till the 1st of February, 1849. Changes, however, were afterwards made in both Commissions.

In the *Practice Commission*, Mr. HILL having resigned, DAVID DUDLEY FIELD was, on the 29th of September, 1847, appointed in his place. The Commission thus reorganized was, by an act passed on the 31st of January, 1849, continued till April, and in April was further continued till the 31st of December of that year. On that day it completed its labors, submitting to the Legislature as complete, two Codes, one of criminal, and the other of civil procedure, including the law of evidence. These Commissioners had previously made four partial reports, the first, on the 29th of February, 1848, containing the Code of Civil Procedure as subsequently enacted, and embracing the substance of the reforms proposed in the practice of the courts in civil cases; the second, on the 29th of January,

1849, containing additions and amendments to the Code as enacted; the third, on the 30th of January, 1849, containing still further provisions; and the fourth, on the same day, containing the draft of a Code of Criminal Procedure. When the completed Codes of Civil and Criminal Procedure were submitted, the Commissioners reported, at the same time, a special act enumerating and repealing the various statutes covered by those Reports.

In the *Code Commission*, Mr. WALWORTH having declined the appointment, ANTHONY L. ROBERTSON was, on the 13th of May, 1847, named in his stead. In January, 1848, Mr. COLLIER resigned, and SETH C. HAWLEY succeeded him. In April, 1849, a new act was passed, appointing Mr. WORDEN and Mr. HAWLEY, with JOHN C. SPENCER, Commissioners of the Code, till the 8th of April, 1851. Mr. SPENCER declined to serve on this Commission, and the Commission itself was abolished by an act passed on the 10th of April, 1850. The Commission, however, was revived in 1857, by an act passed on the 6th of April of that year, by which Mr. FIELD, Mr. WILLIAM CURTIS NOYES, and Mr. ALEXANDER W. BRADFORD were appointed Commissioners, to continue in office five years, and to prepare Codes of all the law not considered by the Practice Commission. In April, 1862, the term of office of these Commissioners was extended to April, 1865.

The labor of this Commission is sufficiently detailed in the Report prefixed to this volume. The works, in their completed forms, of both Commissions, that is, of the Practice Commission as it was reorganized in October, 1847, and of the Code Commission as it was reorganized in April,

1857, are now comprised in six volumes, containing the Code of Civil Procedure (including the Law of Evidence), the Book of Forms, the Code of Criminal Procedure, the Political Code, the Penal Code, and the Civil Code.

Whether the task which these two Commissions had before them was impossible or useless; in other words, whether it was possible, and, if possible, expedient to reduce into a Code "the whole body of the law," had been much debated, both in this country and in England. One view of the subject has been given in the preceding Report. Others may be given here. The question, as was there said, is between written and unwritten law; that is to say, between law written by the lawgiver, and law not thus written; between law promulgated by that department of the government which alone has the prerogative of making and promulgating the laws, and law not so promulgated.

Whether a general Code of the law be *possible*, should seem, from the nature of the subject, hardly to be doubtful. The common law of New York, like the common law of England, from which it is in great part derived, consists of a vast number of rules of property and of conduct, which have been applied by the judicial tribunals, and which had their origin either in legislative enactments, now forgotten, or in traditions from ancient times, or in the consciences of the judges, as the cases came before them. The decisions of the tribunals have been for ages preserved in writing. If there was ever a time when they were held in the memory alone, that time has long passed. All that we now know of the law, we know from written records. To make a Code of the known law is therefore

but to make a complete, analytical, and authoritative compilation from these records. The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. That these records are susceptible of collation, analysis, and arrangement, might have been assumed beforehand, even if we had not the proof in our libraries, in digest upon digest, more or less perfect, to which we daily resort for convenience and instruction. The more perfect a digest becomes, the more nearly it approaches the Code contemplated by the Constitution. In other words, a complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, moulded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State. That this was possible, was all but proven by what had been already done among ourselves.

It was fully proven by what had been done in respect to the law of other countries. The law of Rome in the time of JUSTINIAN was, to say the least, as difficult of reduction into a Code as is our own law at the present day. Yet it was thus reduced, though, no doubt, to the disgust and dismay of many a lawyer of that period. The concurring judgment of thirteen centuries since, has, however, pronounced the Code of JUSTINIAN one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius.

France, at the beginning of her revolution, was governed partly by Roman and partly by customary law. The French Codes made one uniform system for the whole country, supplanting the former laws, and forming a model by which half of Europe has since fashioned its legislation. It should seem, therefore, to be quite beyond dispute, that a general Code of the law is *possible*.

Whether it is also *expedient*, is a different question. One of the objections made is, that it is not possible to provide for all future cases. You may, it is said, stretch your foresight to its utmost limit; you may exhaust all the sagacity and ingenuity of the human mind: the future, nevertheless, is a sealed book: you cannot look into its unopened leaves; and, therefore, attempting to provide for what they contain, is spending your strength in a vain and fruitless effort. This does not appear to be an objection of any weight whatever. Because we cannot provide for all cases, should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible, and as intelligible as we can, is a rational object, though we cannot foresee what ought to be the law in cases yet unknown. To cast aside known rules which are obsolete, to correct those which are burdensome, or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring the different branches into a more perfect order and agreement, may be of immense value, though we cannot look beyond the present, to make provision for what has never yet appeared.

The objection, however, assumes more than should be granted without qualification. There are certain depart-

ments of the law, of which we may affirm with perfect confidence, either that we have provided for every possible case, or that when a new case arises, it is better that it should be provided for by new legislation, than by judicial decision. Thus, in respect to the Penal Code it may be affirmed, that every act for which punishment may be inflicted, ought to be designated beforehand; that no man ought to be punished for an act not thus designated, and that if any act should be committed, for which society has prescribed no punishment, it may go for once unpunished, and a new law be made against other like acts in the future. As to the Political Code, it must by its very nature cover the whole subject. And for the Code of Civil Procedure, it is enough to say, that when the first report was before the Legislature, some of the members were troubled with similar fears about the want of provision for future cases, and, to satisfy them, this provision was introduced: "If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary, to prevent a failure of justice;" but no such case has ever yet arisen.

If a case unprovided for could not arise under the Code of Civil Procedure, much less could it arise under the Code of Criminal Procedure. It may, therefore, be safely affirmed, that there is but one of the five Codes, that is to say, the Civil Code, to which, with any semblance of justice, it may be made an objection that it cannot provide for all future cases. This Code is, undoubtedly, the most important and difficult of all; and of this it is true, that it

cannot provide for all possible cases which the future may disclose. It does not profess to provide for them. All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognized, so far as they ought to be retained, with such amendments as seemed best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the Code, it is to be hoped that analogies may nevertheless be discovered which will enable the courts to decide. If, in any such case, an analogy cannot be found, nor any rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord MANSFIELD, in King *v.* Hay, 1 *W. Bl.*, 640, trusting to future legislation for future cases.

The language of the Code in this respect should seem to be sufficiently guarded, thus:

"§ 2. Law is a rule of property and of conduct, prescribed by the sovereign power of the State.

§ 3. The will of the sovereign power is expressed:

1. By the Constitution, which is the organic act of the people;

2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;

3. By the judgments of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.

§ 4. The common law is divided into:

1. Public law, or the law of nations;

2. Domestic, or municipal law.

§ 5. The evidence of the common law is found in the decisions of the tribunals.

§ 6. In this State there is no common law, in any case, where the law is declared by the five Codes.

§ 2032. The rule that statutes in derogation of the common law are to be strictly construed, has no application to this Code.

§ 2033. All statutes, laws and rules heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided."

Therefore, if there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; while if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same lawgiving department which made it; and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice.

Another objection to the expediency of a Code, is its supposed uncertainty. The argument is this: In the attempt to be systematic and concise, you must of necessity leave the language open to different interpretations. Now, it is quite true that, as a word has often various meanings and a change in the structure of a sentence may suggest different ideas, it is difficult to frame a section that may not be tortured into a meaning unlike that which its framers attached to it. But it is a great mistake to consider this

true only of the concise propositions of a Code. Diffuseness is not a help to clearness. The longest judicial opinions are generally the least precise and the least comprehended. As a long document is usually more obscure than a short one; as a statute of many sections is commonly less understood than one of a few; as many words tend to confusion rather than enlightenment, so a single proposition, carefully expressed and made as concise as possible, is more likely to be precise and susceptible of one meaning only, than if the same idea were put into a different form and a greater number of words.

If it be urged, that reported decisions have this advantage in point of certainty, that, being made in each case with reference to a given state of facts, those facts are illustrations of the rule announced, and tend to explain it. the answer is, that the facts of a case reported serve for limitation, as well as illustration, and just in that proportion the rule announced is partial and not general, and if acted upon as general tends to mislead; so that, after all, we are brought back to the same point, which is, that the rule of the decision, whatever it may be, partial or general, can be more precisely and accurately stated in a few short sentences, than in the opinion more or less diffuse in which it is stated or from which it may be evolved.

So far as reported cases serve for illustration, the present Code makes use of them; for the references to adjudged cases, which in most instances follow the sections, are intended as much to answer the purpose of illustration as to justify the text. It is a favorite idea with many that, for promoting certainty, the propositions of a Code should be

accompanied by illustrative examples. Whatever advantage there may be in this method, these references, it is supposed, will afford the best kind of illustration.

A still further objection to the expediency of a Code is its supposed inflexibility. Expressed in formal propositions, and couched in positive terms, it is not as flexible, say the objectors, as the common law. This is the objection most insisted upon by those who oppose a Code, and it should, therefore, receive the most careful consideration. It may be first observed, that flexibility, in its ordinary sense, is one of the worst qualities which a law can have, or rather that it is inconsistent with the idea of law. As the law is a rule of property and of conduct, it should be fixed. If it be meant that a rule, made for a certain state of facts, may not be applicable to a different state of facts, that will not be disputed; if it be meant that such a rule ought not to be applied to the same state of facts under all circumstances, the objection amounts only to this, that the rule is too broadly stated; if it be meant that a rule ought to be subject to the discretion of the Judges, the proposition is unsound, for the Judges should not have dispensing power.

Another way of stating the objection, is to say that while the common law is expansive, a Code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is, that the common law is elastic and accommodating, and that a Code will be the opposite. Now, to say that a law is expansive, elastic or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any signifi-

cance, is, that it is better to let the Judges make the law as they go along, than to have the lawgiver make it beforehand. For, if the Judges are to decide according to known rules, those rules can be written by the lawgiver as easily as they can be spoken from the Bench, or taken down by the Reporters. And even though, in particular cases, the Judges should fail to find such rules, and should have to make rules as the cases occur, that, too, can be done as easily when the known rules are placed in a Code, as when they repose in the breasts of Judges, or in the leaves of Reports. So long as a Code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases, it is divisible into two parts, one relating to those cases which are foreseen, and the other to those which are not foreseen. Those which are foreseen, the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen, cannot be provided for, except by directing the courts to decide according to the analogy of existing rules, when there is such an analogy, and when there is none, then to decide according to the dictates of natural justice. In this last respect, the Judges will be in the same predicament under a Code as under the common law; so that really, the only point of difference respects those new cases which can be foreseen or reasonably anticipated, and if there be persons who think that for such cases, it is better that the Judges should make the law, after the cases arise, than for the Legislature to make it as a guide beforehand, then they think that government ought not to be divided, according to the funda-

mental American maxim, into three separate legislative, executive and judicial departments.

If we look, for example, at any of the leading cases reported, we see the facts given, the conclusion of the Judges and the reasoning by which the conclusion was reached. Whatever legal proposition is necessarily involved in this conclusion is to be deemed an established rule of law. This rule may be written in a Code, or it may be left in the Reports. Is it any more flexible in the one form than in the other? Certainly not, unless the Judges feel themselves at liberty to depart from it, so long as it remains in the Reports alone. But that would be to declare that the decision is not law.

It is possible that the idea of flexibility in one form, and inflexibility in the other, has arisen from not sufficiently attending to the distinction between general and partial rules. It may be perfectly safe to lay down a certain general rule, but not at all safe to undertake the enumeration of all the particulars to which the rule may be applied. A code which should attempt to do the latter would fail, not because it would be inflexible, but because it would be defective. Take, for example, the rule that implies a promise to pay over money which the party ought not to retain, as announced by Lord MANSFIELD in Moses *v.* McFarlane (2 *Burr.*, 1005), in this language: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money.*" This, as a general rule, could be introduced into a code with perfect safety, while it would be certain and inflexible. But if

there should be an effort to go into details, and to enumerate all the particular cases to which the rule has been or could be applied, the enumeration would be defective, inasmuch as it would be impossible for human foresight to discern all the occurrences to which it might be applicable. It might be possible to collect and enumerate all the instances in which the rule has been applied, and to state the circumstances; it might also be possible to mention many cases likely to arise in the future to which it would also be applicable; but it would never be safe to pronounce absolutely that it should only be applied to the cases enumerated, for the obvious reason that others may occur, just as urgent, which human foresight has failed to discover. The objection to a code which should attempt this would be, not that the rules given were inflexible, or that the code itself was inflexible, in any other sense than that it attempted too much, and was fashioned upon a false principle.

Even in the case supposed, a code and the common law would stand upon the same footing, unless something was put into the former which was not in the latter; for neither in one form or the other are either the general or the particular rules flexible; the general rule is comprehensive, the particular rules are not comprehensive; the latter would be of little value except as pointing to the former, and if that is once given it covers as many cases when inserted in a code as when left in the common law at large.

There is, for instance, a rule of the common law, that a contract is void which is against public policy. What is or is not against it is left for the courts to decide, since the policy changes from generation to generation, and almost

from year to year. The judges are not thereby invested with power to change the law, but to apply established law to the circumstances of each case as it arises, and is then compared with the policy of the State for the time being, or with the general policy of nations. The power to decide the question of compatibility in such a case, between the act and the policy, is not a legislative but a judicial power, as much as to decide whether a by-law of a corporation is or is not reasonable, or whether, in considering the effect of an act performed, the time of performance was reasonable or unreasonable. It may indeed be affirmed, that certain acts are against public policy, and so far the present Code has attempted to go, but it has not attempted, and could not safely attempt, to define all the acts by which men might hereafter seek to countervail that policy, or to foresee what the policy itself should be in ages to come.

If by flexibility be meant susceptibility of progression, then it may be affirmed with confidence, that a code, upon the theory on which this is framed, not only adapts itself to the present wants of society better than the existing common law, but that it contains within itself, in a greater degree, the elements of future progress; not because its rules are any more or less flexible than those of the common law, but for the reasons which will now be stated.

The first of these reasons is, that while the judicial department has been unable, or if able, unwilling, to make necessary amendments of the law, the legislative department, to which the power of amendment of right belongs, has been embarrassed, first, by the disjointed and

comparatively inaccessible form in which the great body of the law has lain, and secondly, by that maxim of the common law by which the judges were taught that every statute in derogation of it was to be strictly construed. The first cause of embarrassment is removed so soon as the Legislature and the people have before them the whole body of the laws in an accessible and compact form, by which the relation of the several parts to each other and to the whole can be better seen, a defect in any part sooner discovered, and the particular amendment indicated which ought to be made. The second cause is removed by the declaration, that the maxim of strict construction has no application to a general code.

Nothing is more conspicuous in the history of jurisprudence than the tenacity with which the Judges of America and England, unlike those of continental Europe, have adhered to precedents, even though the reason for them has ceased, and their mischiefs have become palpable.

Take for example the practice of the courts as it existed before the Code of Civil Procedure. If any part of the common law should have been flexible, that should have been, for it was made almost entirely by the Judges. And yet both here and in England, while they expressed their regret at the state of things, they were compelled to declare that the evils of the system were too deeply rooted to be removed by any power short of the Legislature. Whenever the Legislature did interpose, the courts refused to go beyond the strict letter of the statute. No fact of early English history is more certain than that the existence of equity, as a separate system, was owing to the rigid adherence of the common law judges to form, in other words, to the

iron inflexibility of the common law. Equity itself soon fell into the same predicament. It would not at any time have been thought proper or safe for the courts to disregard an established precedent at law or in equity, upon the idea that the circumstances of the community had so changed as to make the precedent oppressive. Decisions have been frequently overruled, it is true, but upon some such excuse, as that they were made by a divided court or an inferior one, or with reference to particular circumstances or without sufficient consideration.

In almost every instance where an improvement has been made in the laws, it has come from the Legislature. Had society been left to the discipline of the common law, whether it be called flexible or inflexible, the most cruel and bloody of criminal systems would still have shamed us; feudal tenures with all their burdensome incidents would have remained; land would have been inalienable without livery of seizin, and wives would have had only the rights which a barbarous age conceded them.

Even in the matter of contracts, that portion of the common law where the attribute of flexibility would have been, if ever, desirable, what do we still see? While it cannot be denied, that in nine instances out of ten, tenants hire houses in the belief that landlords must repair them if necessary; that tenants who agree to repair, have no suspicion that if the house is burnt they are bound to rebuild; that when a creditor accepts part payment in full satisfaction, the bargain is supposed to be binding; that an instrument under seal, signed by an agent in his own name, but expressly declaring that he signs for his principal, is considered by both parties to be obligatory upon the principal;

yet upon each of these points the common law holds otherwise, and has obstinately refused for hundreds of years to accommodate itself to the undoubted intentions of the parties whose rights it determines.

Either the common law had within itself the flexible, elastic, and accommodating elements, which would have enabled the courts to adapt it in these respects to the expanding exigencies of society, or it has been greatly misunderstood or misrepresented by the opponents of a Code.

The second of the reasons for considering a Code more favorable to progress than the common law, is, that in all those particulars in which the common law does take hold of the business and usages of society, and make use of them in its jurisprudence, it does so not so much by way of incorporating those usages into the law, or indeed making any change in the substance of the law itself, as by way of interpreting the acts and intentions of parties, and applying fixed principles to the ever changing concerns of human life; in all which respects, a Code may and should be more liberal than the common law. Thus it is, that by the present Code, not only are the particular anomalies rectified, which have just been mentioned, but by sections 801, 802, 809, 811 and 1829, the details of the law of contracts are made subordinate to the intentions of the parties, ascertained not by inexorable rules of legal construction, but by all the light which can be thrown upon them by law, usage and surrounding circumstances, except in those few cases, where for reasons of public policy an absolute rule has been established.

Section 1829, it will be seen, is in these words:

"Except where it is otherwise declared, the provisions of the foregoing fifteen Titles of this Part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, where ascertained in the manner prescribed by the chapter on the INTERPRETATION OF CONTRACTS, and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

The usages of society vary with its wants and its pursuits. The law refers to those usages because the parties contract with reference to them, and they must be taken into account when it considers what these parties ought to do and what they ought not to do. In this way, and in this alone, has the common law adapted itself to the exigencies of society, and in this respect the present Code goes not only as far but farther than the common law.

Having thus considered the principal objections to the codification of the law, it should next be considered whether there are advantages in it. Assuming that it is possible to have a body of written law in a convenient form, and in scientific order, containing the materials and framed in the manner already described, what benefits will it confer? In the first place, it will enable the lawyer to dispense with a great number of the books which now incumber the shelves of his library. In the next place, it will thus save a vast amount of labor, now forced upon lawyers and judges, in searching through the reports, examining and collecting cases, and drawing inferences from the decisions, and so far facilitate the dispatch of business in the courts. In the third place, it will afford an opportunity for settling, by legislative enactment, many disputed questions, which the courts have never been able

to settle. In the fourth place, it will enable the Legislature to effect reforms in different branches of the law, which can only be effected by simultaneous and comprehensive legislation. Thus, for example, the closer assimilation of the law of real and personal property, and the changes in the relation of husband and wife, as to property, cannot be effected by any other means so wisely and safely, as by a General Code. The making of a Code involves a general revision of the law. It is indeed in this way alone that such a revision seems practicable. The occasion is thereby afforded to look at the law of the land, as a whole, to lop off its excrescences, reconcile its contradictions, and make it uniform and harmonious. In the fifth place, the publication of a Code will diffuse among the people a more general and accurate knowledge of their rights and duties, than can be obtained in any other manner. This is an object of great importance in all countries, but more especially in ours. If every person can have before him, in an authentic form, the laws which are to affect his property, and govern his conduct, he can have an additional guaranty of his rights, and a better acquaintance with his duties. Here, more than anywhere else, all classes of citizens interfere in all the affairs of the State. They elect, directly, nearly all the officers who make, administer, or execute the laws. If in Holland, or in Germany, or France, a Civil Code has been found beneficial, much more is it likely to be beneficial to us.

So far as the choice lies between law, to be made by the legislature, and law to be made by the judiciary, there cannot be a doubt that whatever may be the determination elsewhere, the people of this State prefer that theirs shall

be made by those whom they elect as legislators, rather than by those whose function it is, according to the theory of the Constitution, to administer the laws as they find them. Hence, the idea of a Code has taken such hold of our people that they have made provision for it by their organic law.

Besides the changes to which attention was particularly directed in the preceding report, relating to the rights of married women, the adoption of children, and the assimilation of the laws of real and personal property, there are others, of less importance, which ought not to be overlooked. They will be found, with few exceptions, in the following sections:

30, 32, 89, 90, 97, 135, 136, 139, 151, 170, 176, 182, 243, 331, 390, 392, 394, 395, 396, 397, 398, 399, 422, 486, 621, 623, 625, 626, 627, 628, 629, 647, 673, 705, 709, 713, 717, 720, 723, 735, 741, 743, 755, 781, 785, 830, 831, 832, 833, 836, 862, 864, 886, 887, 924, 941, 943, 977, 990, 991, 992, 998, 1013, 1065, 1071, 1109, 1140, 1141, 1162, 1166, 1198, 1213, 1263, 1296, 1301, 1302, 1315, 1352, 1353, 1376, 1401, 1406, 1416, 1422, 1439, 1608, 1620, 1623, 1632, 1641, 1643, 1646, 1648, 1651, 1652, 1660, 1729, 1737, 1750, 1751, 1752, 1759, 1762, 1768, 1779, 1781, 1783, 1789, 1791, 1793, 1817, 1847, 1852, 1893, 1901, 1928, 1931, 1936, 1939, 1940.

It remains to take notice of what there is novel in the classification of the subjects treated in this Code. The reasons for the changes in this respect are generally set forth in the notes. It will be observed that there has been some departure from the ordinary arrangement, resulting

principally from the desire of the Commissioners to co each title to a single branch of a general subject, an to permit the repetition of a principle once stated. I first part of the third division, that which treats of gations in general, many provisions are placed, pa larly in respect to the extinction of obligations, which generally been referred to contracts alone. The su of bailments is not treated by itself, but under diff titles, as deposit, loan, hiring, service, carriage, trust, ag and pledge. The matters usually treated under the ti principal and agent, are here treated under service, trus agency. The principles governing all confidential rela are brought together under the head of trust. In the title insurance, the general rules are collected into one ch Suretyship is treated under the title of guaranty. gage, equally with pledge, is treated under the head o an effort having been made to clear the law of mor from the confusions and contradictions which have bee duced by the counter action of law and equity for so years. And in treating of relief, compensatory, s and preventive, the general principles which determi measure of damages, and which fix the limits of s and preventive remedies, are so arranged as to reflect and explain each other.

The Commissioners take this occasion to express sense of the invaluable services rendered to the THOMAS G. SHEARMAN, Esq., of the New York Bar has been engaged on the Civil Code from its comm ment, and whose industry, accuracy and intelligenc cannot praise too highly.

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THE

CIVIL CODE

OF THE

STATE OF NEW YORK.

AN ACT
TO ESTABLISH A CIVIL CODE.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. This act shall be known as the CIVIL CODE OF THE STATE OF NEW YORK. Title of Code.

§ 2. Law is a rule of property and of conduct prescribed by the sovereign power of the state. Definition of law.

§ 3. The will of the sovereign power is expressed: Action of sovereign power.

1. By the constitution, which is the organic act of the people;

2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;

3. By ~~the judgments of the tribunals enforcing those rules which, though not enacted, form what is known as~~ customary or common law.

Two kinds of law.

§ 4. The common law is divided into:

1. Public law, or the law of nations;
2. Domestic, or municipal law.

Common law.

§ 5. The evidence of the common law is found in the decisions of the tribunals.

Id.

§ 6. In this state there is no common law in any case where the law is declared by the five CODES.

Two kinds of civil rights.

§ 7. All original civil rights are either:

1. Rights of person; or,
2. Rights of property.

Rights, how modified.

§ 8. Rights of property and of person may be waived,[1] surrendered or lost by neglect, in the cases provided by law.

[1] Conkling v. King, 10 *N. Y.*, 440.

Divisions of the Civil Code.

§ 9. This CODE has four general divisions:

1. The first relates to Persons;
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3. The third to Obligations;
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DIVISION FOURTH.

GENERAL PROVISIONS

APPLICABLE TO PERSONS, PROPERTY, AND OBLIGATIONS, OR TO TWO OF THOSE SUBJECTS.

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CHAPTER I.

DAMAGES IN GENERAL.

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GENERAL PRINCIPLES.

§ 1832. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages. Person suffering detriment, may recover damages.

§ 1833. Detriment is a loss or harm suffered in person or property. Detriment, what.

This word is used in order to avoid the repetition of the words "loss or harm" in the numerous places in which they must otherwise occur. Injury signifies the wrongful act, and not its results, while on the other hand there may be loss without injury. The phrase "*damnum absque injuria*," is familiar to lawyers. The word "harm" alone would be inadequate to express all the meaning of "loss."

§ 1834. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future. Injuries resulting or probable after suit brought.

Drew v. Sixth Avenue R. R., 26 N. Y., 49.

CHAPTER II.

MEASURE OF DAMAGES.

ARTICLE I.

DAMAGES FOR BREACH OF CONTRACT.

Measure of damages for breach of contract.

§ 1340. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, which the party in fault had notice, at the time of entering into the contract,[1] or at any time before the breach,[2] and while it was in his power to perform the contract upon his part,[3] would be likely to result from such breach, or which, in the ordinary course of things, would be likely to result therefrom.[4]

Damages of lienor.

§ 1865. One having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 1863 for loss of time and expenses.

Pariah *v.* Wheeler, 22 *N. Y.*, 494; Chadwick *v.* Lamb, 29 *Barb.*, 513; Seaman *v.* Luce, 23 *id.*, 240. Against a mere stranger the lienor recovers the full value (Alt *v.* Weidenberg, 6 *Bosw.*, 176; Dows *v.* Rush, 28 *Barb.*, 157; see Turner *v.* Hardcastle, 11 *C. B.* [*N. S.*], 683).

Seduction.

§ 1866. The damages for seduction rest in the sound discretion of the jury.

Travis *v.* Barger, 24 *Barb.*, 614; Knight *v.* Wilcox, 18 *id.*, 312; Ingersoll *v.* Jones, 5 *id.*, 361; Lee *v.* Hodges, 13 *Gratt.*, 726.

Injuries to animals.

§ 1867. For wrongful injuries to animals, being subjects of property, committed willfully, or by gross negligence, in disregard of humanity, exemplary damages may be given.

Wort *v.* Jenkins, 14 *Johns.*, 352.

ARTICLE III.

PENAL DAMAGES.

Failure to quit, after notice.

§ 1868. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay.

See 1 *R. S.*, 745, § 10.

Tenant willfully holding over.

§ 1869. For willfully holding over real property, by a tenant after the end of his term, and after notice to quit has been duly given, and demand of possession made, the measure of damages is double the

yearly value of the property, for the time of withholding, in addition to compensation for the detriment occasioned thereby.

Sec 1 *R. S.*, 745, § 11.

Forcible exclusion from possession of real property.

§ 1870. For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

2 *R. S.*, 338, § 4.

Injuries to trees, &c.

§ 1871. For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

2 *R. S.*, 338, §§ 1-3.

ARTICLE IV.

GENERAL PROVISIONS.

Value, how estimated in favor of seller.

§ 1872. In estimating damages, the value of property, to a seller thereof, is deemed to be the price[1] which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer,[2] and at such time after the

breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.[2]

[1] Obviously, a seller can sustain no injury by reason of any peculiar value of the thing sold.

[2] See Gregory v. McDowell, 8 *Wend.*, 436.

[3] Loder v. Kekulé, 3 *C. B.* [*N. S.*], 128; see Simons v. Patchett, 7 *E. & B.*, 863.

Value, how estimated in favor of buyer.

§ 1873. In estimating damages, except as provided by sections 1874 and 1875, the value of property, to a buyer or owner thereof,[1] deprived of its possession, is deemed to be the price[2] at which he might have bought an equivalent thing,[3] in the market[3] nearest to the place where the property ought to have been put into his possession,[4] and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.[5]

[1] It will be found that there is no distinction between the buyer and the owner of goods in respect to the matters to which this section relates.

[2] Havemeyer v. Cunningham, 36 *Barb.*, 615; Smith v. Griffith, 3 *Hill*, 333; King v. Orser, 4 *Duer*, 431; Davis v. Shields, 24 *Wend.*, 322; 26 *id.*, 341; see Lawrence v. Wardwell, 6 *Barb.*, 423; Comstock v. Hutchinson, 10 *id.*, 211; Gerard v. Prouty, 34 *id.*, 454; Hamilton v. Ganyard, *id.*, 204; Moller v. Eno, 14 *N. Y.*, 597; M'Knight v. Dunlop, 5 *id.*, 537; Dana v. Fiedler, 12 *id.*, 40; Stevens v. Low, 2 *Hill*, 132; Cary v. Gruman, 4 *id.*, 625.

[3] The price at which a purchase could have been made, is alone to be regarded, even though the purchaser bought for speculation, and could not have sold again at such a price (Dana v. Fiedler, 12 *N. Y.*, 40).

[4] Gregory v. McDowell, 8 *Wend.*, 435.

[5] Josling v. Irvine, 6 *H. & N.*, 512; see Loder v. Kekulé, 3 *C. B.* [*N. S.*], 128. The rule usually stated is that the buyer can recover only the price of the day upon which delivery ought to have been made (Dana v. Fiedler, 12 *N. Y.*, 40; Clark v. Dales, 20 *Barb.*, 42; Belden v. Nicolay, 4 *E. D. Smith*, 14; Davis v. Shields, 24 *Wend.*, 322; 26 *id.*, 341; Gregory v. McDowell, 8 *id.*, 435; Tempest v. Kilner, 3 *C. B.*, 249; see Peterson v. Ayre, 13 *id.*, 353). But the question discussed in Josling v. Irvine was not raised in these cases.

§ 1874. Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer. Property of peculiar value.

See Suydam v. Jenkins, 3 *Sandf.*, 614, 621.

§ 1875. For the purpose of estimating damages, the value of a thing in action is presumed to be equal to that of the property to which it entitles its owner. Value of thing in action.

So held as to a note (Decker v. Mathews, 12 *N. Y.*, 313; Ingalls v. Lord, 1 *Cow.*, 240), or other debt (Thomas v. Dickinson, 12 *N. Y.*, 364; S. C., again, 23 *Barb.*, 431), or an agreement to convey land (Clowes v. Hawley, 12 *Johns.*, 484).

This presumption is not conclusive (Allen v. Suydam, 20 *Wend.*, 321; Ingalls v. Lord, 1 *Cow.*, 240; see Thomas v. Dickinson, above cited).

§ 1876. The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned. Damages allowed in this chapter exclusive of others.

§ 1877. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on EXEMPLARY DAMAGES and PENAL DAMAGES, and in sections 1859, 1866 and 1867. Limitation of damages.

This is an established principle of equity (Skinner v. White, 17 *Johns.*, 357; rev'g S. C., 2 *Johns. Ch.*, 526), which, since the union of law and equity, should be recognized as a rule of damages. See a decision upon a similar question in Russell v. Roberts, 3 *E. D. Smith*, 318.

§ 1878. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. Damages to be reasonable.

James v. Morgan, 2 *Levinz*, 111; Thornborow v. Whitacre, 2 *Ld. Raym.*, 1164. In the first case, the defendant had agreed to pay, for a horse sold to him, a farthing for his first shoe nail, two farthings for the second, four for the third, and so on, for the thirty-two nails in the horse's shoes. This, of course, amounted to many thousand pounds sterling, for which the plaintiff sued. But the court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case, a somewhat similar bargain was entered into, the damages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the court was, at first, about to give judgment for the whole sum demanded; but an *amicus curiæ* mentioning the case of James v. Morgan, the action was settled, under an intimation of the court, by the repayment of the consideration received for the contract (2s. 6d.), and costs.

Nominal damages

§ 1879. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

Hamlin v. Great Northern Railw. Co., 1 *H. & N.*, 408; Marzetti v. Williams, 1 *B. & Ad.*, 415.

TITLE III.

SPECIFIC AND PREVENTIVE RELIEF.

CHAPTER I.

GENERAL PRINCIPLES.

Exc. A 1865

DRAFT

OF A

CIVIL CODE

FOR THE

STATE OF NEW YORK;

PREPARED BY

THE COMMISSIONERS OF THE CODE,

12465

AND

SUBMITTED TO THE JUDGES AND OTHERS FOR EXAMINATION, PRIOR TO REVISION BY THE COMMISSIONERS.

ALBANY:
WEED, PARSONS AND COMPANY, PRINTERS.
1862.

ANALYSIS OF THE CONTENTS.

DIVISION FOURTH.

GENERAL PROVISIONS, APPLICABLE TO PERSONS, PROPERTY, AND OBLIGATIONS.

THE

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§ 3. The sovereign power for this purpose acts: Action of sovereign power.

1. By constitution or organic acts of the people;

2. By acts of the legislature, or of other and subordinate legislative bodies;

8. By enforcing through the tribunals those rules which, though not enacted, form what is known as customary law.

Two kinds of law.

§ 4. Customary law is divided into:

1. Public law or the law of nations;
2. Domestic or municipal law.

Customary law.

§ 5. The evidence of the customary law is found in the decisions of the tribunals.

Id.

§ 6. In this state there is no customary law, in any case, so far as the same is provided for by the five Codes.

Two kinds of civil rights.

§ 7. All original civil rights are either:

1. Rights of person, or,
2. Rights of property.

Rights, how modified.

§ 8. Rights of property and of person may be waived,[1] surrendered or lost by neglect, in the cases provided by law.

[1] Conkling v. King, 10 *N. Y.*, 440.

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§ 9. This Code is divided into four general divisions:

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DIVISION FOURTH.

GENERAL PROVISIONS.

APPLICABLE TO PERSONS, PROPERTY, AND OBLIGATIONS, OR TO TWO OF THOSE SUBJECTS.

PART I.

RELIEF.

TITLE I.

OF THE DIFFERENT KINDS OF RELIEF.

Compensation in damages.

§ 1493. As a general rule, compensation is the relief or remedy provided by law for the violation of private rights, and the means of securing their observance.

Preventive and specific relief.

§ 1494. Specific and preventive relief may be given in certain specified cases, and in none others.

TITLE II.

COMPENSATORY RELIEF.

CHAPTER I.

GENERAL PRINCIPLES.

ARTICLE I.

DEFINITION AND GENERAL PROVISIONS.

Right to damages.

§ 1495. Whoever suffers loss or harm[1] by the unlawful act or omission of another, is entitled to have from him a compensation in money therefor; which is called Damages.

[1] Sedgwick on Damages, 31, 32; 23 *Verm.*, 231. The references to Sedgwick are according to the original paging.

What injuries create the right to damages.

§ 1496. In order to create a right to damages the loss or harm must be the direct and immediate [*or* proximate and natural[1]], consequence of the unlawful act or omission complained of, or such a consequence as was foreseen, or could be [*or* may reasonably be supposed to have been[2]] foreseen at the time of such unlawful act or omission, or, if the loss occurred through a breach of contract, then at the time of

In actions other than on contract.

§ 1501. In actions arising from causes other than contract,[1] and in all cases of oppression, fraud, or malice, interest may be given, in the discretion of the jury.[2]

[1] Sedgwick on Dam., 386, 386.

[2] Wilson v. Conine, 2 *Johns.*, 280; Bissel v. Hopkins, 4 *Cow.*, 68; Hyde v. Stone, 7 *Wend.*, 354; Baker v. Weller, 8 *Wend.*, 604; Dillerbuck v. Jerome, 7 *Cow.*, 294.

Limit of rate by contract.

§ 1502. On a contract to pay with interest, at a less rate than the lawful limit, the creditor, after a breach, is not entitled to the full lawful interest, except in case of fraud,[1] but the rate is governed by the contract, until it ceases by being merged in a new obligation.[2]

[1] Miller v. Burroughs, 4 *Johns. Ch.*, 436; Van Beuren v. Van Gansbeek, 4 *Cow.*, 496.

[2] Lawrence v. Leake & Watts Orphan House, 2 *Den.*, 577.

ARTICLE III.

EXEMPLARY DAMAGES.

SECTION 1503. Exemplary damages, in what cases allowed.

Exemplary damages, in what cases allowed.

§ 1503. In all cases of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give exemplary, or vindictive, damages,[1] for example's sake, and by way of punishing the defendant.[2]

[1] In this we have followed the doctrine established by the Court of Appeals (Hunt v. Bennett, 19 *N. Y.*, 173; and see Fry v. Bennett, 1 *Abb. Pr.*, 280; 4 *Duer*, 247; and cases. S. P., Cahel v. Deakin, 20 *Wend.*, 172; Brizzee v. Maybee, 21 *id.* 144); but, upon principle, there seems no reason why it should be preserved.

[2] Tillotson v. Cheetham, 3 *Johns.*, 56, 64.

CHAPTER II.

MEASURE OF DAMAGES.

General test of the measure of damages.

§ 1504. The measure of damages is, in general, that amount which will compensate for the injury suffered. But greater damages may be awarded, as provided in section 1503, whenever an unlawful act or omission, which has caused actual damage, is accompanied by oppression, fraud or malice, actual or presumed; and in cases of seduction or breach of promise of marriage. And where an unlawful act or omission has caused no loss to the plaintiff, he may yet have nominal damages.

Measure of damages in certain cases.

§ 1505. In the following cases, the measure of damages is as follows:

Breach of covenant of warranty

1. For breach of covenants of warranty and of quiet enjoyment in conveyances of real property, the value of

and quiet enjoyment in grants of real property.

the property at the time of the conveyance,[1] with interest thereon for such time as the grantee has derived no benefit from the property,[2] and his expenses in defending the possession. When the eviction is from only a part of the premises the rule is the same, substituting for the value of the whole the value of such part at the time of the conveyance, taken in proportion to the value of the whole.[3]

[1] Sedgwick Dam., 169; Staats v. Ten Eyck's Exrs., 3 *Caines*, 111.
[2] Sedgwick Dam., 169; Baxter v. Ryerss, 18 *Barb.*, 261.
[3] Bingham v. Weklerwax, 1 *N. Y.*, 509.

Seisin and right to convey.

2. For breach of covenants of seisin and right to convey the consideration paid with interest during such time as the grantee derived no benefit from the property.[1]

[1] Sedgwick Dam., 175, 177.

Against incumbrances.

3. For breach of covenants against incumbrances, the sum actually expended by the grantee in extinguishing the same;[1] or when the incumbrances are still outstanding, [and not in the grantee's power to extinguish them] then the annual interest on the purchase money during the continuance of such incumbrance.[2]

[1] Sedgwick Dam., 178; Delavergne v. Norris, 7 *Johns.*, 358; but see 10 *Wend.*, 142.
[2] Rickett v. Snyder, 9 *Wend.*, 423.

Covenant to convey land.

4. For a breach of covenant to convey, in the absence of bad faith, the purchase money paid;[1] but adding thereto, in case of fraud, the damages arising from the loss of the bargain.[2]

[1] Sedgwick Dam., 180. See Conger v. Weaver, 20 *N. Y.*, 140.
[2] Trull v. Granger, 8 *N. Y.*, 115; Brinkerhoff v. Phelps, 24 *Barb.*, 100; Sedgwick, 210.

Covenant to buy land.

5. For a breach of a covenant to buy land, the agreed price with interest.[1]

[1] Franchot v. Leach, 5 *Cow.*, 506; Richards v. Edick, 17 *Barb.*, 260.

Warranty of personal property.

6. For a breach of warranty of personal property sold, the difference in value of the property as it is and as it was warranted to be.[1]

[1] Tallman v. Clute, 3 *Barb.*, 424; Cary v. Gruman, 4 *Hill*, 626; Comstock v. Hutchinson, 10 *Barb.*, 211; Roberts v. Carter, 28 *Barb.*, 402; Milburn v. Belloni, 12 *Abb. Pr.*, 461. This rule may need some qualification, as it scarcely does justice in cases where an article is warranted fit for a particular purpose.

Breach of contract of sale of personal property by seller.

7. For a breach of contract of sale of personal property by the seller, the difference between the contract price and the market value at the time and place,[1] when and where it should have been delivered,[2] with interest on that difference;[3] but if the buyer has paid the purchase money in advance, then the highest market price at any time [between the agreed time of delivery] and the settlement of the question[4] [at the place of delivery.]

[1] Gregory v. McDowell, 8 *Wend.*, 435.
Sedgwick Dam., 200, 286; but see Suydam v. Jenkins, 3 *Sandf.*, 614; Burdon v. Nicolai, 4 *E. D. Smith*, 14.
[3] Dana v. Fiedler, 12 *N. Y.*, 41.
[4] Sedgwick Dam., 261, 264, 265.

Breach of contract of sale of personal property by buyer.

8. For the like breach by the buyer, the price named in the contract, if the property has been delivered,[1] or has not been resold by the seller;[2] if resold, then the difference between the price agreed and the price obtained at such resale.[3]

[1] Sedgwick Dam., 280.
[2] Hall v. Bigelow, 20 *Barb.*, 21; Bement v. Smith, 15 *Wend.*, 493.
[3] Bement v. Smith, 15 *Wend.*, 493.

Breach of carrier's contract.

9. For a breach of a carrier's contract to deliver personal property, the market value thereof at the place [and on the day] agreed upon for delivery,[1] with interest from that day, deducting freight and other expenses of transportation;[2]

[1] Smith v. Griffith, 3 *Hill*, 333; Kent v. H. R. R. R. Co., 22 *Barb.*, 278.
[2] Sedgwick on Damages, 365; Sherman v. Wells, 28 *Barb.*, 403.
[3] Sherman v. Wells, 28 *Barb.*, 403; Atkinson v. Steamboat Castle Garden, 28 *Mis.*, 124.

Losses under policies of marine insurance.

10. For losses, under policies of marine insurance, when the loss is partial, the actual cost of repair, deducting one-third as provided in the chapter on Marine Insurance. In total losses the value is ascertained by deducting from the value, at the time of sailing, one-fifth; and the freight money must contribute on one-half, and be contributed for on the whole.

Leavenworth v. Delafield, 1 *Caines*, 573. But see Mutual Safety Ins. Co. v. The George, 8 *Law Rep.*, 361.

Breach of promise of marriage.

11. For a breach of a promise of marriage the damages rest in the sound discretion of the jury, under the circumstances of each case.

Pitcher v. Livingston, 4 *Johns.*, 1, 12; Dennick v. Lockwood, 10 *Wend.*, 142, 155.

Breach of promise to pay liquidated sum.

12. For a breach of an obligation to pay money only, the amount due with lawful interest,[1] subject, however, to the provisions of section 623 of this Code;

[1] Sedgw. on Dam., 230; Code La., 1929.

Dishonor of bills of exchange.

13. For dishonor of foreign bills of exchange, such damages as are prescribed by sections 1340 to 1343, inclusive.

Breaches of other contracts.

14. For breaches of other contracts the measure of damages depends on the terms of the contract itself, whenever it is possible to apply them as a basis of calculation. But whenever the contract plainly appears to be unconscionable in its terms, it does not give the measure of damages.

Russell v. Roberts, 3 *E. D. Smith*, 318. See James v. Morgan, 2 Levinz. 111.

Wrongful occupation of real property.

15. For the wrongful occupation of real property, the mesne profits, or annual value[1] of the property for not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages,[2] with interest from the times at which such profits respectively accrued,[3] and the cost, if any, of recovering the possession.[4] [But this provision does not apply to cases of dower.[5]]

[1] Sedgw. on D., 125.

[2] 2 Rev. Stat., 311, § 60; Jackson v. Wood, 24 *Wend.*, 443. It may be thought better to omit this special limitation, and leave the general limitation of actions to apply.

[3] See Jackson v. Wood, *supra*.

[4] 2 *Burr.*, 666.

[5] The abolition of dower in future is proposed in the Second Division of this Code. This provision will leave damages in such cases to the existing statutes.

Unlawful entries on land, &c., creation of nuisances.

16. For unlawful entries on land, or interference with the enjoyment thereof, and for the erection or continuance of nuisances, the amount of loss or harm directly resulting from the act complained of.

Walter v. Post, 4 *Abb. Pr.*, 382.

Forcible exclusion from possession of real property.

17. For forcibly ejecting or excluding a person from the possession of real property, three times the actual damages.[1]

[1] 2 R. S., 338, § 4.

Injuries to trees, &c.

18. For wrongful injuries to trees, timber or underwood upon the land of another, or removal thereof, three times the actual damages, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of the highway officers for the purposes of the highways; in which cases the damages are the actual loss or harm.[1]

[1] 2 R. S., 338, §§ 1-3.

Wrongful sale of a pledge.

19. For the wrongful sale of a pledge, the value of the thing pledged at the time of the application to redeem.[1]

[1] Cortelyou v. Lansing, 2 *Cai. Cas.*, 200.

Wrongful conversion of personal property.

20. For the wrongful taking and conversion of personal property other than things in action, the highest market value of the property between the conversion and the trial,[1] with a fair compensation for time lost and expenses incurred in the pursuit of the property.[2] But in actions arising upon a lien, the damages cannot exceed the amount of the lien.[3]

[1] Sedgwick on Damages, 479, and cases; Wilson v. Matthews, 24 *Barb.*, 205.

[2] Bennett v. Lockwood, 20 *Wend.*, 223.

[3] Spoor v. Holland, 8 *Wend.*, 445.

Injuries to animals.

21. For injuries to animals, committed wilfully, or by gross negligence, in disregard of humanity, exemplary damages may be given.

Cases of fraud, oppression and malice.

§ 1606. The damages prescribed by the last section do not include the exemplary damages which may be given in cases of fraud, oppression or malice, actual or presumed, except as therein expressly provided.

Ex T.B.C.5

INV .1898.

THE

REVISED STATUTES

OF THE

STATE OF NEW-YORK,

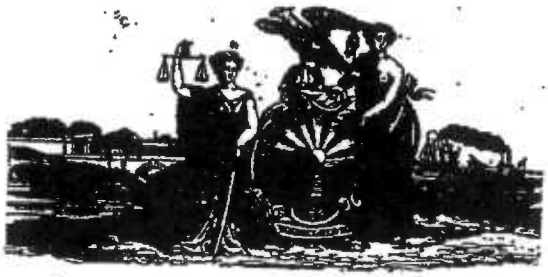
PASSED DURING THE YEARS ONE THOUSAND EIGHT HUNDRED AND TWENTY-SEVEN, AND ONE THOUSAND EIGHT HUNDRED AND TWENTY-EIGHT:

TO WHICH ARE ADDED,

CERTAIN FORMER ACTS WHICH HAVE NOT BEEN REVISED.

PRINTED AND PUBLISHED UNDER THE DIRECTION OF THE REVISERS, APPOINTED FOR THAT PURPOSE.

IN THREE VOLUMES.



VOLUME II.

CONTAINING THE FIFTH, SIXTH, SEVENTH AND EIGHTH CHAPTERS OF THE SECOND PART OF THE REVISED STATUTES, AND THE WHOLE OF THE THIRD AND FOURTH PARTS.

ALBANY:
PRINTED BY PACKARD AND VAN BENTHUYSEN.
1829.

LIS - 6

ADVERTISEMENT.

During the session of the Legislature which ended on the 5th of May, 1829, several acts of a permanent nature and of general interest, were passed, some of them supplementary to former laws, others introducing new principles, and others altering, either in express terms or by necessary implication, provisions of the Revised Statutes. In two instances where an opportunity was afforded, that part of the text of the Revised Statutes contained in this volume which was printed after the passage of these laws, has been amended in conformity to them, pursuant to the authority conferred on the Revisers. The alterations not thus introduced into the body of the work, and all other public laws of general interest, passed by the last legislature, will be found in the third volume; and they will also be noticed, under their appropriate heads, in the General Index at the end of this volume.

To afford the public the earliest opportunity of becoming acquainted with the provisions of the Revised Statutes, the first and second volumes will be issued, without waiting for the publication of the third. It has therefore been thought advisable, to insert in an Appendix to this volume, the "Act concerning the Revised Statutes," and so much of the general Repealing Act as relates to the construction of those statutes, instead of reserving them for the third volume, as proposed in the Preface.

Although no pains have been spared to secure perfect accuracy in the publication of the text, several errors of the press have been detected since the printing was completed. Such of them as appear to be important, are enumerated in a note at the end of this volume.

1829.

Pursuant to the "Act concerning the Revised Statutes," passed on the 10th of December, 1828, We, the undersigned, two of the Revisers of the Statutes of the state of New-York, do hereby certify, that the text of the Revised Statutes contained in this volume, has been examined and compared by us with the original acts passed by the Legislature, and with the acts amending such originals; and that this volume was printed by the printers employed by us for that purpose, under the authority conferred by law.

B. F. BUTLER,
JOHN C. SPENCER.

June 5, 1829.

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CHAP. V. OF TITLE TO PROPERTY, REAL AND PERSONAL, TRANSMITTED OR ACQUIRED BY SPECIAL PROVISIONS OF LAW: Containing two Titles.

Title 1. Of the assignment of the estates of non-resident, absconding, insolvent or imprisoned debtors: Containing *eight Articles.*

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TITLE 1.

provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.

Exceptions of persons under disabilities.

§ 58. But if the person entitled to file any bill specified in the two last sections, be at the time of discovering the facts constituting such fraud, or at the time the cause for filing such bill shall accrue, under any of the disabilities in the first and second Articles of this Title enumerated, the time during which such disability shall continue, shall be excepted from the limitations contained in the two last sections, in the same manner and with the like effect, as such time is herein excepted from the limitations prescribed for commencing actions at law; and in case of the death of the person so entitled, during such disability, or before the expiration of the time herein limited for filing such bills, the same may be filed by the heirs or representatives of such person, as the case may require, within the same time as allowed in the said first and second Articles for commencing actions at law in the like cases.

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OF TRESPASS ON LANDS.

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2. Cases in which single damages only to be recovered.
3. Just value of timber taken for roads or bridges, only to be recovered.
4. Treble damages by persons forcibly ousted, &c.

Treble damages in certain cases.

§ 1. Every person who shall cut down or carry off, any wood, underwood, trees or timber, or shall girdle or otherwise despoil any trees, on the land of any other person, without the leave of the owner thereof, or on the land or commons of any city or town, without having any right or privilege in such commons, and without license from the corporation or proper officers of such city or town, shall forfeit and pay to the owner of such land, or to such city or town, treble the amount of the damages which shall be assessed therefor in an action of trespass, by a jury, or by a justice of the peace in cases provided by law.[45]

Exceptions of certain cases.

§ 2. If upon the trial of any such action, it shall appear that the trespass was casual and involuntary; or that the defendant had probable cause to believe that the land on which such trespass was committed, was his own; or that such wood, trees, or timber were taken for the purpose of making or repairing any public road or bridge, by the authority of a commissioner or overseer of highways; judgment shall be given to recover only the single damages assessed by the jury.[45]

Ib.

§ 3. Nothing in either of the preceding sections shall authorise any person to recover more than the just value of any timber taken for the making or repairing any public roads or bridges.[45]

Forcible entry or detainer.

§ 4. If any person be disseised, ejected or put out of any lands or tenements, in a forcible manner, or being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the

(45) 1 R. L. p. 525, § 29.

damages assessed by the jury or by a justice of the peace, in cases provided by law.[46]

TITLE VII.

GENERAL PROVISIONS CONCERNING ACTIONS RELATING TO REAL PROPERTY.

Reversioners, &c. when to be admitted.

§ 1. If any tenant for life, in dower, or by the curtesy, be impleaded, and the person to whom the reversion or remainder appertains, shall come into court before any trial shall have been had in such action, or before judgment by default therein, and pray to be received to defend his right, he shall be received for that purpose, and shall be permitted to plead to the action, upon such terms as the court shall deem just.[47]

When to recover after default of tenant.

§ 2. If any tenant for life or years, make default or give up any lands demanded, so that judgment be given on such default or surrender, the heir or person to whom the reversion or remainder of such lands appertains, may, after the death of such tenant, have an action of ejectment to recover the same lands.

Restitution on reversal of judgment.

§ 3. If a judgment be reversed, the tenant who lost by the first judgment, if he be in life, shall be restored to the possession of the tenements so lost, with the issues in the mean time, and the party pursuing, to the arrearages of rent, if any be due, for the same tenements; and if such tenant be dead at the time of the judgment given upon any writ of error, restitution shall be made to the party pursuing, with the issues after the death of the said tenant, together with the arrearages of rent, if any were due, in the life time of the said tenant.[48]

(46) 1 R. L. p. 524, § 22. (47) Ib. p. 193, § 5. (48) Ib. § 6.

(Exc. 5xxix, c.lvi)

New York (State) Laws, statutes, &c

LAWS

OF THE

STATE OF NEW-YORK,

REVISED AND PASSED

AT THE

THIRTY-SIXTH SESSION

OF THE

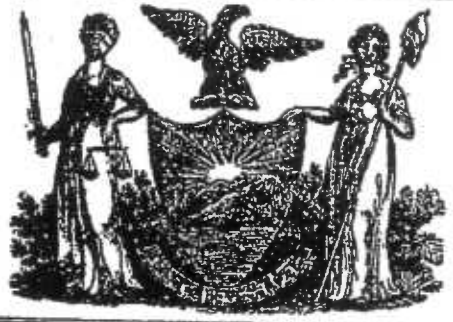
LEGISLATURE,

WITH MARGINAL NOTES AND REFERENCES,

PUBLISHED BY THE REVISORS,

WILLIAM P. VAN NESS & JOHN WOODWORTH, Esquires.

Pursuant to the Act, entitled "An Act for Publishing the Laws of this State," passed April 12th, 1813.



[PUBLISHED BY AUTHORITY.]

IN TWO VOLUMES.—VOL. I.

ALBANY:
PRINTED AND PUBLISHED BY H. C. SOUTHWICK & Co.
No. 94, State-Street.
1813.

LIS - 7

STATE OF NEW-YORK, }
SECRETARY'S OFFICE. }

I DO hereby Certify, that HENRY C. SOUTHWICK is duly authorised and appointed to print and publish the Laws of the State of New-York, in pursuance of an Act of the Legislature of the said State, entitled "An Act for publishing the Laws of this State," passed April 13, 1813, and that according to the said act, the "laws so printed and published, shall be evidence in all Courts of Justice whatsoever."

Given under my hand and seal of office, this fourth day of September, 1813.

(L.S.)

JACOB RUTSEN VAN RENSSELAER, *Secretary*.

BY DANIEL D. TOMPKINS, Governor of the State of New-York—It is hereby Certified, that Jacob Rutsen Van Rensselaer is Secretary of the State of New-York, and that full faith and credit are due to his acts in that capacity.

In testimony whereof, I have hereunto subscribed my name, and affixed the privy seal of the said State, at the City of Albany, the fourth day of September, 1813.

(L.S.)

DANIEL D. TOMPKINS.

District of New-York, ss:

BE it remembered, that on the seventeenth day of May, in the thirty-seventh year of the Independence of the United States of America, H. C. SOUTHWICK & Co. of the said District, have deposited in this office the title of a Book, the right whereof they claim as proprietors, in the words following, to wit:

"LAWS OF THE STATE OF NEW-YORK, revised and passed at the thirty-sixth session of the Legislature, with marginal notes and references, furnished by the revisors, William P. Van Ness and John Woodworth, Esquires, pursuant to the act, entitled "an act for publishing the laws of this state," passed April 13th, 1813."

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of Learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies, during the time therein mentioned." And also to an act, entitled "An act for the encouragement of Learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

THERON RUDD, Clerk
of the District of New-York.

INTRODUCTION.

THE REVISORS, having executed the trust reposed in them by the Legislature, present to the public *the Laws of the State of New-York*, in *two* volumes. They have excluded from this edition all private and local acts, except such of the latter as were deemed of sufficient general importance to merit publication. The *titles* of certain acts of *Incorporation* and of certain other acts, which were submitted by the Revisors in their report to the Legislature at the last session, together with the *titles* of the acts of *Incorporation, &c.* of that session, have been inserted in this edition.

TO MOST of the laws, it will be perceived have been added *marginal notes and references*, accompanied in some instances with a succinct view or history of the origin and progress of the law under our *Colonial*, and present *State*, government. These notes, &c. it is proper to observe, were collected and digested by JOHN V. N. YATES, Esquire, who was requested to perform that service. Although errors of the press and other errors have doubtless escaped all our vigilance and care, yet it is believed the work will be found generally correct, and to gentlemen of the bar essentially useful.

THE Revisors have here added *explanatory notes* in order to enable the reader correctly to understand the *references*, &c. in this work.

EXPLANATORY NOTES.

Br. ed. refers to.....{ *Bradford's Edition* of the colonial laws, in *one* volume, published in 1710, containing the laws from 1691 to 1709, inclusive; and also, certain *ordinances* of the Governor and Council, and a *Journal* of the General Assembly, from 1702 to 1709. This edition of the colonial laws is supposed to be the earliest extant. *Bradford* (who was printer to the colony) published also an Edition in 1726, including the laws from 1691 to 1725, inclusive; but the Edition of 1710, is the one referred to in this work.

R.&L. refers to..... The edition of the colonial laws collected, revised, and published (by direction of the General Assembly) by *William Smith, junior, and William Livingston, Esquires*, in 1762. The laws in force, from 1691 to 1762, are included in this edition, which consists of *two* volumes.

V.S. refers to..... The edition (likewise *revised* and collected by direction of the General Assembly) published by *Peter Van Schaack, Esquire*, in 1774, consisting of *two* volumes, and containing the colonial laws from 1691 to 1773, inclusive.

J.&V. refers to..... The edition of the laws of the *State* of New-York, revised and collected by direction of the legislature, and published in 1789, by *Samuel Jones and Richard Varick, Esquires*, consisting of *two* volumes, and containing the laws of the State from the adoption of the Constitution in 1777 to 1789, inclusive—also, containing in *an appendix*, certain *colonial* laws.

Gr. refers to..... The edition, in *three* volumes, published by *Mr. Thomas Greenleaf*, containing the laws of the State from 1777 to 1797, inclusive, (8 years *later* than the edition of Jones and Varick.) This edition, though not published under the direction of the Legislature, became a necessary subject of reference for acts from 1789 to 1797. The last publication of Greenleaf's edition was in 1798.

L.or. And. refers to The laws from 1798, inclusive, to 1801, inclusive, published by *Mr. Loring Andrews*, then state printer. These are generally referred to by *the Sessions* in which they were passed and their *chapters*.

K.&R. refers to..... The edition in *two* volumes, which was revised by direction of the Legislature, by *Mr. Chief Justice Kent and Mr. (then) Justice Radcliff*, in 1801, and published in 1802, containing *all the laws of the State then in force*. This edition has been commonly referred to in the reports, &c. as the *revised laws*, or R. L. and, with their subsequent alterations and amendments, were in force immediately preceding this revision.

W. refers to..... The edition published by *Messrs. Charles R. and George Webster*, being a *continuation* of the laws revised by Ch. Jus. Kent and J. Radcliff, from 1802, to 1812, inclusive, in *four* volumes, designated as volume 3, 4, 5 and 6.—Vol. 3, containing the laws from 1802 to 1804—vol. 4, from 1805 [the extra session in November] to 1808, inclusive—vol. 5, from 1807 to 1809, inclusive—and vol. 6, from 1810 to 1812, inclusve.—This Edition was not published by direction of the Legislature.

B. refers to..... The laws of 1802, published by *Mr. John Barber*, then State-printer.

S. refers to..... The laws of 1813, published by *Solomon Southwick, Esquire*, the present state printer.

CARE has been taken (with but few exceptions) to insert in the margin of each section notes indicating where the corresponding section (if any) in the revised laws of K.&R. or in their continuation by W. and S. can be found. This has only been omitted when the *whole* act in those editions has been adopted in the present. Hence, with little difficulty, the references to the statutes by *Caines* and *Johnson* in their Reports, &c. can be ascertained, and their usefulness thus preserved.

SMITH'S *History of New-York* (London edition of 1757) and *Colquhoun's Police of London* (Philadelphia edition of 1798) have, in a few instances, been referred to under *Smith's Hist. N. Y.* and *Colq. Pol. Lond.*. These works are considered as authority, and of deserved celebrity and utility.

THE references to *Caines'* and *Johnson's* Reports and Cases, &c. to the *English and British acts of Parliament*, and occasionally to *English and American Reporters*, &c. being in the usually abridged form, will be readily understood by the profession for whose use they are principally intended.

THE *colonial* acts of the Legislature of 1683, have also been the subject of reference in this work. These acts are not to be found in any edition extant. Indeed, but few of them are preserved in the Secretary's office, to which resort has been had. The Revisors have supposed the publication of a few of the most important and leading statutes of that year (being the *era of legislation* in this, then, Colony—the *first* Colonial Assembly having met in 1683) would neither prove uninteresting or useless to the reader. These, together with certain important *ordinances* of the Governor and Council of the Colony, and the *articles of capitulation* in 1664, (confirmed by *treaty* in 1673–4) by which the *Dutch* surrendered this Colony to the *English*, and thereby enabled them, with a short interruption only, to *legislate* over it, till our separation from Great-Britain, have been published in this work.

WILLIAM P. VAN NESS.
JOHN WOODWORTH.

December 1, 1813.

NOTE, BY THE PUBLISHERS.

The following *references*, and their *explanations*, are given to the reader by way of example:

REFERENCES.	EXPLANATIONS.
Br. ed. 79.....	*Bradford's edition*, page 79.
S.&L. v. 1. 29.....	*Smith and Livingston's* edition, *volume* 1, page 29,
Ibid. v. 2. 310.....	*volume* 2, page 310.
Gr. v. 1. 12.....	*Greenleaf's* edition, *volume* 1, page 12—*volume* 2,
Ibid. v. 2. 96.....	page 96—*volume* 3, page 112.
Ibid. v. 3. 112.....	
Sess. 32. c. 198. § 2	*Session* 32, *chapter* 198, *section* 2, &c. &c.

The above, it is presumed, will be sufficient to enable the reader, in every case, to ascertain the *edition*, *volume*, *page*, *session*, *chapter*, &c. referred to in this work.

plaintiffs and defendants to such proceedings, that the purchaser under such sale may be protected in his title acquired thereby.

The court of chancery authorised to direct a sale to be made in partition, etc.

XVI. *And be it further enacted*, That the court of chancery, in cases of partition pending therein, may decree a sale of the premises in such cases as the courts of law are authorised by this act, or where the ends of justice shall require it; and the said court of chancery, in any case where it shall decree a partition to be made, if the same cannot be made equal between the parties without prejudice to their rights and interests, may decree a compensation to be made by one party to the other, for equality of partition according to the nature and equity of the case.

Sales and partitions in chancery how to operate.

XVII. *And be it further enacted*, That all sales and partitions made under and in virtue of proceedings had in the court of chancery, shall be firm and effectual forever; and the final decree of the said court, for or upon the partition or sale of any lands, tenements, hereditament or premises whatever, mentioned in any bill or petition presented according to law, and the course and practice of the said court, or for or upon sale of part and partition of the residue thereof, shall be binding and conclusive on all parties named in the said bill or petition, and their legal representatives, and also on all such parties interested, who or whose interests may be unknown, and their legal representatives, as absolutely and effectually, to all intents and purposes, as if such sales, partitions and proceedings, had been made and taken place under this act, in a court of law, and judgment had been thereupon given in manner as herein aforesaid: *Provided*, That in case any one or more of the parties interested in the premises, or the estate, or quantity of interest of any or [illegible] of the owners, are unknown to the complainant or petitioner, suitable allegations and charges to that effect shall be inserted in the bill or petition, and an affidavit of the truth of such allegations, made by one of the parties, and annexed to, and filed with, the said bill or petition; and an order of the said court, published for three calendar months, once at least in every week, in a newspaper printed in each of the cities of New-York and Albany, containing therein a sufficient description of the premises whereof partition is sought, and requiring all parties interested in the same to appear and answer the bill or petition, by a day in the said order to be specified, and the publication of which order shall authorise a decree or order of the said court for taking the said bill or petition *pro confesso* against all such unknown parties as shall not appear and answer by the day mentioned in the said order, or on such further day as the said court shall appoint; and all such as may appear shall be entitled to be made parties to the suit, and the said bill or petition shall be amended accordingly: *And provided further*, That it shall be lawful for any party to such decree, or any party interested in the premises, though not named in the pleadings, to appeal from the said decree, or from any decree or order of the said court in the cause, within the same times, and under the like restrictions and regulations, as in other cases.

How far binding.

Proviso, proceedings where some of the owners are unknown, etc.

Order of the court to be published.

Bill or petition where and how to be taken *pro confesso*.

Further proviso

Proceedings in partition not to abate by

XVIII. *And be it further enacted*, That if any of the parties in any suit for the partition of lands, now depending, or hereafter to be commenced, shall die, the proceedings in such case shall not be thereby abated, but such suit may be continued on suggestion of the death of such party as may die, in case the interest shall survive to the survivor or survivors, and in other cases such suit shall and may be revived by or against the heirs or devisees of such deceased party, in such manner, and by such proceedings as the court, in which such suit is or shall be depending, may from time to time direct.

the death of any party. 8 & 9 W. 3, c 11. § 7

XIX. *And be it further enacted*, That nothing in this act shall be so construed as to invalidate any proceedings had, or to be had, in any suit already commenced for the partition of lands, and that all proceedings in any such suit hereafter to be had, may be according to the provisions of this act, or according to the several acts in force before the passing of this act.

This act not to affect proceedings already commenced.

CHAP. LVI.

An ACT for the amendment of the Law and the better advancement of Justice.

Passed, April 5, 1813.

[Br. ed. 31.—S.&L. v. 1. 106, 356.—V. S. v. 1. 95.—Ibid. v. 2. 517, 613, 638, 767.—J.&V. v. 2. 242, 269, 281, 437.—Gr. v. 2. 73. 102, to 116, 261.—Ibid. v. 3. 358.—K.&R. v 1. 346.—W. v. 3. 354.—Ibid. v. 4. 247.—Ibid. v. 5. 504.—Sess. 34. ch. 202, 238, 240.]

The general issue with notice of special matter of like effect as if special matter had been pleaded. K.&R. v 1. 346 sec 1. 2 John. Rep 163 4 Ibid. 123 8 Ib. 129, 455

1. *Be it enacted by the people of the State of New-York, represented in Senate and Assembly*, That it shall be lawful for any defendant or tenant in any action in any court of record to plead the general issue, and to give any special matter in evidence, which if pleaded would be a bar to such action, giving notice with the said plea of the matter or several matters so intended to be given in evidence: *And further*, That if two or more persons dealing together, be indebted to each other, or have demands arising on contract or credits against each other, and one of them, or his or her executors or administrators sue any one or more of the others, his or their executors or administrators, in any court of this state, if the defendant cannot gainsay the deed or assumption upon which the suit is brought, it shall be lawful for such defendant to plead the general issue as aforesaid, and give notice in writing with the said plea, of what such defendant will insist upon at the trial for his or her discharge, and to give any such bond, bill, receipt, account, contract, credit or demand so given notice of, in evidence; and if such suit be brought on a bond or other contract for the recovery of a penalty for the non-payment of money only, and if any bond, bill or contract with such penalty as aforesaid, shall be given in evidence for the plaintiff or defendant upon such trial, in all such cases the sum *bona fide* and in equity due, and not the penalty, shall be deemed to be the debt in Error 3.

[No similar provision in England.]

In case of mutual dealings, defendant may set off his demand on notice given, and may have judgment for the balance if any due. 2 Geo. 2. c. 22 5 Geo. 2. c 30 8 Geo. 2. c 24 3 Bl. Com. 304, 305 2 Caines's Rep. 23, 299 2 Caines's c Error 3.

[*Note.*—The English statutes allow the sett-off to be *pleaded* or *notice* thereof to be given with the general issue: But *no balance* is allowed to be recovered against the plaintiff. *Sett-offs* were not allowable at common law. *Net-offs* were first allowed in the colony, and the defendant permitted to have a *balance* certified in his favor, Sept. 4, 1714.—*vide* S.&L. v. 1. 106—V. S. v. 1. 95.]

Defendant may bring money into court on such suits. K&R. v 1 349. sec 6 4 Ann. c 16

VI. *And be it further enacted*, That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court all the principal money and interest due on such bond, and also all such costs as have been expended in any suit in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall give judgment to discharge every such defendant of and from the same.

Proceedings on bonds for the performance of covenants, and how to assign breaches and assess damages, etc. K. and R. v. 1. 349, sec. 7 W. v. 5. 500. Sess. 22, c 137, sec. 1 8 and 9 W. 3 c.11—1 Saund. Rep. 58—note 1—2 Saund. Rep. 187, note a. b. c.—Johns. ca. 406—3 Ib. 297—2 John. Rep. 413—4 Ib. 189, 213—8 Ib. 112

VII. *And be it further enacted*, That in all actions prosecuted in any court of record upon any bond, or for any penal sum for non-performance of any covenants in any indenture, deed or writing, or upon any bond with any condition other than for the payment of money, the plaintiff shall assign as many breaches as he may think fit, and the jury upon trial of such action, shall assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if the judgment shall be given for the plaintiff on a demurrer or by confession or *nihil dicit*, the plaintiff may suggest upon the record as many breaches of the covenants, conditions or agreements, as he shall think fit, upon which shall issue a writ to the sheriff of the county where the action is laid, to summon a jury to appear at the next circuit court or sittings to be held in the county where the venue in such action is laid, or before the sheriff of such county, to enquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby, in which writ, if to be executed at the circuit court or sittings, it shall be commanded to the justice who shall hold such circuit court or sittings, that he make a return thereof to the court from whence the same writ shall issue, at the time in such writ mentioned; and in case the defendant, after such judgment entered, and before any execution executed, shall pay into the court where the action is brought, to the use of the plaintiff, or his executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, conditions or agreements, together with costs of suit, a stay of execution of the said judgment shall be entered upon record; or if by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied, all such damages so assessed, together with his costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands and goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but in each case such judgment shall remain as a further security, to answer to the plaintiff, and his executors or administrators, such damages as shall be sustained for further breach of any covenant, condition or agreement in the same bond, indenture, deed or writing contained, upon which the plaintiff, or his executors or administrators may have a *scire facias* upon the said judgment against the defendant, or against his heirs, devisees, or ter-tenants, or executors or administrators, suggesting other breaches of the said covenants, conditions or agreements, and to summon him or them respectively to shew cause why execution shall not be had upon the said judgment, upon which there shall be the like proceedings as were in the action of debt upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches or inquiry thereof upon a writ to be awarded in manner aforesaid; and upon payment or satisfaction in manner as aforesaid, of such future damages, costs and charges, all further proceedings on the said judgment shall again be stayed, and so *toties quoties*, and the defendant, his body, lands and goods shall be discharged out of execution as aforesaid.

Enquiry may be executed before circuit court, etc. or before the sheriff as in other cases.

When execution to stay.

When defendant shall be discharged.

But judgment to remain as security for further breaches, etc.

VIII. *And be it further enacted*, That if any person be arrested by any process issuing out of any court of record, at the suit of any common person, and the sheriff or other officer shall take bail from such person against whom such process issued, the sheriff or other officer, or in case of the death of such sheriff or other officer, then his executor or administrators, at the request and costs of the plaintiff or his lawful attorney, shall assign to the plaintiff the bail bond or other security taken from such bail, by endorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses; and if the said bail bond or assignment, or other security taken for bail, be forfeited, the plaintiff, after such assignment made, may bring an action thereupon in his own name, and the court where the action is brought may, by rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond or other security taken from such bail, as is agreeable to justice; and such rules of the said court shall have the nature and effect of a defeazance of such bail bond or other security for bail.

Bail bonds assignable to plaintiff by sheriff or his executors, &c. K. & R. v 1. 351 § 8. 4 and 5 Ann. ch. 4? 4 Ann. c. 16

Defendants may be relieved from suits on such bonds and how

IX. *And be it further enacted*, That if in any action there be two or more plaintiffs or defendants, and one or more of them shall die, the action shall not be thereby abated if the cause of such action shall survive, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

When action not to abate by death, &c. K&R. v 1. 351 § 9. 8 and 9 W. 3 c. 11. sec. 7

X. *And be it further enacted*, That it shall be lawful for any defendant or tenant, in any action, or for any plaintiff in replevin in any court of record, with the leave of the same court, to plead as many several matters as he shall think necessary for his defence: *Provided nevertheless*, That if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be thereupon given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall also be given in like manner, unless the judge, who tried the said issue, shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.

Defendant by leave of the court may plead several pleas, &c. K&R. v 1. 352 § 10 4 Ann. c. 16 sec. 4

XI. *And be it further enacted*, That if any material witness in any action in any court of record in this state shall not reside in this state, it shall be lawful for the said court, on affi-

Commission to examine foreign witnesses how and when to issue

davit or proof being made thereof to the satisfaction of the said court, and upon motion made by either party in open court, and upon such terms as the said court shall think proper, to award and issue under the seal of the same court a commission to such persons as the same court may think fit, authorising them, or any two or more of them, to examine such witness on oath upon the interrogatories annexed to such commission, and to reduce such examinations into writing, and to return the same annexed to the said commission into the said court with all convenient speed; and the name of every witness to be examined by virtue of any such commission, shall be inserted in the same commission, and the interrogatories for the examination of every such witness shall be drawn and signed by the parties or their counsel in the cause in which the testimony is to be used, or such of them as shall request such commission, and be approved of by the same court, or one of the judges thereof, and shall be annexed to such commission, and each party shall be at liberty, with the approbation of such court or judge, to insert in such interrogatories all such questions as he may deem proper; and the said commissioners, or any two or more of them, shall and may examine the witnesses named therein, or such of them as they can meet with, on oath, and cause the examination of each witness to be reduced to writing and signed by the same witness, and such commissioners shall then also sign the same; and all such examinations and all exhibits produced to such commissioners and proved by any such witness, shall be annexed to the said commission and returned to the court out of which such commission issued, closed up and under the seals of two or more of the said commissioners; and if it is not convenient for either of the said commissioners to carry the same to one of the judges of the said court, then one of the said commissioners shall deliver the same to the agent of the party on whose behalf such witnesses shall be examined, and such agent, or in case of his death the person into whose hands the same shall come, shall deliver the same to one of the judges of the said court, and make oath or affidavit before the same judge, that he received the same from the hands of one of the commissioners; or if such agent be dead, then such affidavit shall set forth in what manner the same came into the hands of the person who shall so deliver the same, and that the same has not been opened or altered since he so received it; and such judge shall then open the same, and endorse upon the commission, as the case may be, either received by the hands of one of the commissioners, or upon the oath of the person who delivers the same, as appears by his affidavit, and subscribe his name to the same endorsement, and shall then deposit the said commission and return with the said affidavit in the office of the clerk of the said court, there to remain as a record; and every such deposition being so taken and returned shall be allowed and read, and shall be deemed as good and competent evidence in the cause in which it shall be taken as if such witness had been sworn and examined *viva voce* in open court on the trial of such cause; and all parties concerned shall be entitled to take copies of such depositions at their own costs and

K. & R. v 1. 351 § 11
1 Caines' Rep 4, 73, 343, 502 517
2 Ib. 46, 47, 353, 359
3 Ib. 105, 321
1 John. Ca. 103
2 Ib. 68, 69, 70, 285
3 Ib. 137
2 John. Rep. 107, 108, 370 417, 478
3 Ib. 231, 259
4 Ib. 120
9 Ib. 266

How to be executed and returned

Effect of depositions so taken and returned

Parties entitled to copies

charges, as soon as the same shall be deposited in the clerk's office as aforesaid; and in case any such commission shall not be returned within such reasonable time as the said court shall from time to time allow for that purpose, then the said court may proceed as if no such commission had been awarded.

Commissions to be returned in a reasonable time, or cause to proceed

XII. *And be it further enacted*, That where any issue is or shall be joined, whether the issue roll be filed or not, in any action in any court of record, and the plaintiff shall neglect to bring such issue to be tried according to the course and practice of such court, it shall be lawful for such court, at any time after such neglect, upon motion made in open court, due notice having been given thereof, to give the like judgment for the defendant as in cases of nonsuit, unless the same court shall, upon just cause and reasonable terms, allow a further time or times for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time or times so allowed, the said court shall give such judgment as aforesaid, and all judgments so given shall be of the like force and effect as judgments upon nonsuits, and of no other force or effect; and the defendant, upon such judgment, shall have costs in any action where he would upon nonsuit be entitled to the same, and in no other action whatsoever.

Judgment as in case of nonsuit for not bringing cause to trial

K. & R. v 1. 352 § 12.
14 Geo. 3. c 17
1 Caines' Rep 6, 22, 58, 67, 124, 171
2 Ib. 47, 52, 93 94, 95; 96, 251, 378
3 Ib. 94, 128, 135, 136, 140
1 John. Ca. 30, 242
2 Ib. 217, 218
1 John. Rep. 141, 491; 507
3 Ib. 442, 443, 446, 541
6 Ib. 393
9 Ib. 260, 265

XIII. *And be it further enacted*, That all persons jointly indebted to any other person upon any joint obligation, contract, or matter whatsoever, for which remedy might be had at law against such debtors, in case all were taken by process issued out of any court in this state, shall be answerable to their creditors separately for such debts, that is to say: the creditor or creditors of such debtors may issue process against them in the manner now in use; and in case any of such joint debtors be taken and brought into court, he or they so taken and brought in court, shall answer to the plaintiff; and in case judgment shall pass for the plaintiff, he shall have his judgment and execution against such of them as were brought into court and against the other joint debtors named in the process in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against any lands or goods the sole property of any person not brought into court.

Proceedings against joint debtors where all cannot be taken

K. & R. v 1. 352 § 13
(No similar proceeding in England. The mode pursued is to outlaw the defendants not found.)
2 John. Ca. 339, 382
1 John. Rep. 61
2 Ib. 67, 270 391
4 Ib. 222
6 Ib. 5 99
10 Ib. 21, 22

XIV. *And be it further enacted*, That where two or more persons are or shall be bound in one bond or recognizance jointly and severally, or severally only, it shall be lawful in every such case to join all the obligors in such bond or recognizance, or any part of them, in one action, and to prosecute the same to judgment and execution against the defendants in such action, and against their joint or separate property, and afterwards, if the whole amount due upon such bond or recognizance shall not be levied upon such first suit or judgment, to bring a further action against the residue of the said obligors, or any of them jointly or severally at the option of the plaintiff, and the same to prosecute to judgment and execution against the said residue of the said obligors, or any of them, and against their joint or separate property; but the plaintiff shall not cause to be levied in the whole

How two or more persons jointly or severally in one bond or recognizance may be sued

K. & R. v 1. 354 § 10

more than the amount of the debt and damages due to him, with the costs of suit, and if separate writs shall be issued against such obligors or any of them, the plaintiff shall be at liberty in any stage of the suits to consolidate them into one suit, and shall in no case when two or more suits are depending at the same time upon the same bond or recognizance, or on any promissory note or bill of exchange, to recover more than the costs of one of the said suits; but where the defendants reside in different counties, and writs are issued in several counties, the costs on each writ shall be taxed together, and in the same bill with the costs of such suit.

As to consolidating suits.

Costs, how far recoverable.

Assessment of damages by the clerk in what cases allowed. K. & R. v 1, 334 § 3 2 John Rep. 507 4 Ib. 247 10 Ib. 218

XV. *And be it further enacted*, That when any interlocutory judgment shall be given in any court of law by default, or upon demurrer, or confession, in any action upon any bill of exchange or promissory note for the payment of money, or upon any written contract for a sum certain, though payable in specific articles, or upon a like contract for specific articles, at a value or price stipulated in the same contract, or upon a covenant for the payment of money only, instead of awarding a writ of enquiry, the court shall direct the clerk of such court, if a court of common pleas, and if the supreme court, then the clerk of the said supreme court or the clerk of the court of common pleas of the county where the venue shall be laid, unless the venue shall be laid in the county where the supreme court shall sit, and in such case the clerk of the supreme court only, and it is hereby made the duty of such clerks respectively to perform the service, and to examine, ascertain and determine what sum the plaintiff ought to recover for damages, and either party may except to such report, and upon such exception, the court shall hear and examine the matter, and cause justice to be done to the parties, and shall give judgment for the plaintiff for the sum so reported, or in case of exception to the report for the sum so ascertained by the court; and the judgment shall be entered on the record without entering thereon such reference to the clerk, or any of the proceedings in consequence thereof, in the usual form of entering judgments by confession where the amount of the damages is confessed, except that instead of the words "his damages aforesaid above confessed," the following words shall be inserted, that is to say, "his (or her, or their) damages by occasion of the premises, (to the sum for which the judgment is given) by the court here assessed," or words of like import.*

Either party may except to the report of the clerk.

Form of judgment on the report of clerk.

Assessment of damages by clerk in cases of suits on bail bonds. K. & R. v 1, 335 § 16

XVI. *And be it further enacted*, That when any plaintiff shall obtain judgment upon any bail bond taken in any such action, or in any action of debt upon judgment or recognizance, or upon any specialty or contract for the payment of money only, unless the defendant in the original action shall appear and obtain leave to plead therein, the said courts shall direct the clerks respectively

[* No such *statutory* provision in England, but the courts will in some similar cases refer the damages to be assessed by the master, prothonotary, &c and this as at common law. The clerk first authorised to assess damages in this state, &c. July 1, 1797—vide Gr. v. 3. 358.]

as aforesaid, and it is hereby made the duty of such clerks respectively, to perform the service, and to examine, ascertain and report to the court the amount of the debt or sum of money due to the plaintiff in the original action, and either party may except to such report, and upon such exception the court shall hear and examine the matter, and cause justice to be done to the parties; and the plaintiff shall cause the sum so reported or ascertained, with the amount of the costs in the original suit, and in the suit upon the bail bond, to be endorsed upon the execution to be issued upon the judgment obtained on such bail bond, and may cause the same and the poundage thereon and no more, to be levied by virtue thereof; and when any plaintiff shall obtain judgment upon any bail bond taken in any other action, unless the defendant in the original action shall appear and obtain leave to plead therein, the court shall direct common bail to be filed for the defendant in such original action and order a judgment to be entered therein by default, and award a writ of inquiry thereupon, and upon the return of such writ of inquiry the plaintiff may cause the damages found by the jury with the amount of the costs in the original suit, and in the suit upon the bail bond and the poundage thereon, and no more, to be levied on the judgment on such bail bond, and shall cause the same to be endorsed on the execution to be issued in the action on such bail bond.

How and when in such actions a writ of enquiry to issue.

On assessments before the clerk, not necessary to prove the instrument declared on. K. & R. v 1 336. § 17

XVII. *And be it further enacted*, That in those cases where the courts shall direct their clerks to examine, ascertain and determine what sum the plaintiff ought to recover for damages, it shall not be necessary at any time thereafter to prove the giving or executing any bill of exchange, promissory note, covenant or contract specially and truly set forth in the plaintiff's declaration, but the production thereof to the clerks shall be sufficient evidence of the giving or executing of the same, and the clerks shall endorse on such note, bill or contract that judgment hath been rendered thereon, and the amount of the damages ascertained therein, and shall respectively sign their names thereto.

But he shall endorse on such instrument the amount of the damages assessed.

Where necessary to produce witnesses before the clerk, he is to swear them, etc K. & R. v 1 336. § 18

XVIII. *And be it further enacted*, That in those cases where it shall be necessary to adduce evidence to the clerks, they shall be and are hereby authorised to swear any witness or witnesses offered, and shall, if required by either of the parties at the time of taking the same, reduce the testimony to writing, and shall report the same to the court on being required.

Clerks of counties to appoint deputies K. & R. v 1 336 § 19

XIX. *And be it further enacted*, That it shall be the duty of the respective clerks of the several counties within this state to keep some proper person deputy clerk of the same county during the pleasure of said clerk, and as often as such deputy clerk shall die or be removed from office or remove out of the county, or become incapable of executing the office, another shall be appointed in his place by writing, under the hand and seal of the clerk, and every such deputation or appointment shall be recorded in the office of the clerk of the same county, who shall, in case of the death of the clerk thereof, perform all the duties and receive the emoluments appertaining to the office of clerk of the same county and be subject to the same penalties that the clerks of the several

And such deputy to act as clerk, in case of vacancy by death, etc.

counties within this state are liable to, until a new clerk for the said county shall be appointed and duly sworn.

Allowance to witnesses, etc. K&R. v 1, 336 § 20 W. v 2, 234 Sess. 26. c 103 § 23

XX. *And be it further enacted*, That each person served with process to testify in any court of record within this state shall be entitled to receive as a compensation for his attendance and expenses of such court, the daily allowance specified in the act regulating the fees of the several officers and ministers of justice within this state; and if any person being subpœnaed upon being tendered with the amount of the said allowance, estimating each day's travelling to, attending at, and returning from, such court, computing thirty miles to a day's travelling, and including one day's attendance only, shall not thereupon appear according to the tenor of the said process, without a lawful and reasonable excuse, shall forfeit to the party grieved fifty dollars, and shall also yield further recompence to the party grieved according to the loss and hindrance sustained, to be recovered by action of debt in any court, with costs of suit.

Penalty on them for not appearing to testify, etc.

Poor persons, when and how to be assisted in suits grats. K & R. v 1 337. § 21 11 H. 7. c 12 23 H. 8. c 15

XXI. *And be it further enacted*, That every poor person not of ability to sue, and who shall have cause of action against any person, shall have, by the discretion of the chancellor, writs original or writs of subpœna, without paying for the same; and if the suit is to be prosecuted in the court of chancery, the chancellor shall assign to such poor person solicitors and counsel, and all other officers requisite for prosecuting the suit, who shall do their duty therein without taking any reward for the same; and if such action is to be prosecuted in any other court, the judges thereof shall, by their discretion, assign to such poor person attornies and counsel, and all other officers requisite for prosecuting the suit, who shall do their duty therein without taking any reward for the same, and in case any such plaintiff be non-suited, or a verdict or judgment be given against him, he shall not be compelled to pay any costs in such action.

In trespass *quare clausum fregit*, def't may disclaim and plead tender of amends etc. K&R. v 1 337. § 23 21 Jac. I. c 16 § 6

XXII. *And be it further enacted*, That all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea or in his notice with the general issue, any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead or give notice with the general issue of a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, if the defendant pleads specially, the plaintiff shall join issue, and if any issue to be joined as aforesaid, shall be found for the defendant, or the plaintiff shall be non-suited, the plaintiff shall be barred from the said action, and all other suits concerning the same.

Dilatory pleas to be sworn to etc. K and R. v 1 337 § 23 4 Ann. c. 16 § 11

XXIII. *And be it further enacted*, That no dilatory plea shall be received in any court of record unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.

Essoins and wager of law abolished.

XXIV. *And be it further enacted*, That no *essoin* shall be allowed in any suit, and no person shall be permitted to wage his law in any case, except that of *non summons* in real actions.*

K&R. v 1. 338 § 24

Grants of land valid without attornment. K&R. v 1. 337 § 23 4 Ann c 16 11 Geo 2. c. 19.

XXV. *And be it further enacted*, That all grants and conveyances made since the eighth day of March, one thousand seven hundred and seventy-three, or hereafter to be made, by fine or otherwise, of any lands, or tenements, or rents issuing therefrom, or, of the reversion, or remainder, of any lands, or tenements, shall be valid, without any attornment of the tenants of any such lands or tenements: *Provided however*, That no such tenant shall be prejudiced by payment of any rent to any such grantor or cognizor, or by breach of any condition for non-payment of rent, before notice given to him of such grant or conveyance.

Proviso.

Warranties by tenants for life void K&R. v 1. 338 § 26 References *supra*. Collateral warranties by ancestor, etc. when void. 4 Ann c. 16

XXVI. *And be it further enacted*, That all warranties made since the eighth day of March, one thousand seven hundred and seventy-three, or hereafter to be made by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all collateral warranties which have been made since the day and year aforesaid, or hereafter to be made, of any lands, tenements, or hereditaments, by any ancestor who had no estate of inheritance in possession in the same, at the time of making such warranty, shall be void against his heirs.

Foreman of grand-jury may administer oaths. K&R. v 1. 336 § 27

XXVII. *And be it further enacted*, That every foreman of a grand-jury shall be, from the time of his being appointed until his discharge, authorised to administer the usual oath or affirmation to such witnesses as shall come to give evidence to the grand-jury whereof he is foreman.

Certain trespasses punishable by fine and imprisonment. Sess 24. c 235 § 2 26 H. 3. c. 17. 3 Edw. 1. c. 20

XXVIII. *And be it further enacted*, That any person who shall wilfully commit trespass, by cutting down or destroying any kind of wood, or timber, standing, or growing, upon the lands of the people of this state, or of any person or persons whatsoever, or shall wilfully commit trespass, by carrying away any kind of wood or timber, which may be lying upon such lands, or shall wilfully and maliciously cut down, lop, girdle, bark or injure any orchard, or fruit tree, or trees, without the consent of the owner or owners of the land whereon such orchard fruit tree, or trees was, or were standing or growing, shall be deemed guilty of a misdemeanor, and being convicted thereof by due course of law, shall be punished by fine, or imprisonment, at the discretion of the court before which such conviction shall be had: *Provided always*, That no person, so convicted by virtue of this act, shall be imprisoned for a longer term of time than one year, or fined in a sum exceeding fifty dollars.

Proviso.

Treble damages allowed against certain trespasses on lands.

XXIX. *And be it further enacted*, That if any person or persons shall cut any wood, underwood, trees, or timber, or shall girdle, or otherwise despoil any fruit trees on land, the title

* English statutes, as to *Essoins*. *St. Marlb.* 52 H. 3. c. 13, 20. *St. Westm.* 1. 3 Ed. 1. c. 42, 43, 44. *St. Westm.* 2 13 Ed. 1. c. 28. *St. Glouc.* 6 Ed. 1. c. 8, 10. *St. Wall.* 12 Ed. 1. 13 Ed. 1. c. 12, 17, 27. 12 Ed. 2. st. 2. 5 Ed. 3. c. 6. 9 Ed. 3. st. 1. c. 3. *St. de vian. &c. incerti temp.* 1 vol. Ruffh. English statutes at large, p. 188. English statutes as to *wager of law*. M. C. 9. H. 3. c. 23. *St. Wall.* 12 Ed. 1.—28 Ed. 3. st. 1. c. 5. 6 R. 2. st. 2. c. 5. 5 H. 4. c. 8. 14&15 H. 8. c. 26. sec. 74.

W. v. 4. 247 — Sess 18. c 94 — Rev. ed. 31, 32 — 37 ch. 8. c. 6 — 8 John. Rep. 342.

whereof is in the people of this state, such person or persons, not being actual settlers on such land, or on the commons of any city or town, he or they having no right or privilege in such commons, and not having obtained license from the corporation, or trustees, of such city or town, or on any other land, without the leave or permission of the owner or owners thereof, or shall in like manner, carry off any wood, underwood, trees, or timber, from the same, such person or persons shall pay to the owner or owners of such land, treble the value of the wood, underwood, trees, or timber, cut or carried off, as aforesaid, to be recovered with costs, in an action of trespass, before any court, having cognizance of the same, by the owner or owners of the land, on which such trespass shall have been committed, or if such trespass shall be committed on the commons of any city or town, then by the corporation of the city, or by the trustees of the town to which such commons shall belong; but if such land shall belong to the people of this state, then by the overseers of the poor of the town in which such trespass or trespasses shall be committed, for the use of the poor thereof; *Provided always*, That if upon the trial of any action of trespass, for cutting down, destroying, or carrying away, any trees, timber, or underwood, it shall appear by evidence, that the trespass was casual and involuntary, or that the defendant had probable cause to believe, that the land on which the trees, timber, or underwood, so cut, destroyed and carried away, were his own, in such case the court, having cognizance of the cause, shall give judgment for the plaintiff, to recover single damages only, and costs of suit: *Provided also*, That nothing herein contained shall authorise any person to recover more than the just value of any timber taken for the making or repairing any public roads or bridges, with costs.

Proviso.

Further proviso.

Attaints on untrue verdicts abolished. 2 N.R. v. 1. 358 § 28.

XXX. *And be it further enacted*, That attaints upon untrue verdicts shall be abolished: *And further*, That none of the statutes of England or Great-Britain shall be considered as laws of this state.*

English statutes not laws of this state.

When a trial may be had in a foreign county.

XXXI. *And be it further enacted*, That in case any issue or issues are, or shall be joined, which are by law local and require trial in any of the new counties wherein the supreme court

* The statutes of England and Great-Britain ceased to be the laws of this state on the 1st May, 1788. *Vide* Gr. v. 2. 516, § 37. Till that period, such as composed the law of the Colony on the 19th April, 1775, were in force in this state *Vide* Constitution of the state, art. XXXV. It is not unworthy of remark, that none of the statutes of *Mortmain* were adopted in this state, and of course they cannot now be considered the law of this state. The English statutes of *Mortmain* are, 9 H. 5. c. 36. 7 Ed. 1. st. 2. 13 Ed. 1. c. 32. 18 Ed. 1. st. 1. c. 3. 15 R. 2. c. 5. 27 Ed. 1. st. 2. 34 Ed. 1. st. 3. 18 Ed. 3. st. 3. c. 3. 23 H. 8. c. 10. 1&2 Ph.&M c. 8. 35 El. c. 7. 39 El. c. 5. 17 Car. 2. c. 3. 22 Car. 2. c. 6. 7&8 W. 3. c 37. 9 Geo. 2. c. 36. &c. How far any of the provisions in the statutes of *Mortmain* are applicable to this state, is a question, neither necessary nor proper, here to discuss.

English statutes, relative to *attaints*. *St. Westm.* 1. 3 Ed. 1 c. 38 34 Ed. 3. c. 7. 13 Ed. 1. c. 30. *St. de Vic.* 14. Ed. 3. 1 El. 3. st. 1. c. 5. 5 Ed. 3. c 6, 7. 28 Ed. 3. c 8. 34 Ed. 3. c. 7. 9 R. 2. c. 3. 13 R. 2 st. 1. c. 18. 3 H. 5. st. 2. c. 5. 11 H. 6. c. 4. 15 H. 6. c. 5. 18 H. 7. c. 21, 24. 19 H. 7. c. 3. 23 H. 8. c. 3. 27 H. 8. c. 5.

have not yet appointed circuit courts, it shall be lawful for the supreme court, on the application of either of the parties, on due notice being given, to make order for the trial of any such issue or issues, in some adjoining county, and such trial shall be as available, as if had in the county in which the venues are laid.

Sess. 34, c 112 § 6

XXXII. *And be it further enacted*, That all private acts passed, or to be passed, by the legislature, and printed by the printer of the state, shall and may be read in evidence in all cases, and in all courts in this state, from the printed statute book, any law or usage to the contrary notwithstanding.

The statute book printed by the printer to the state, evidence of private acts. Sess. 34 ch. 246 § 46.

XXXIII. *And be it further enacted*, That it shall and may be lawful for any person or persons seized of an estate in remainder or reversion, to maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or for years.

Waste and trespass maintainable by the reversioner or remainder man. Sess. 34. ch. 246 § 47

XXXIV. *And be it further enacted*, That no female person shall be imprisoned upon execution, in any civil action for debt or damages hereafter to be brought in any court whatsoever, in which the debt or damages recovered shall not, exclusive of costs, amount to more than fifty dollars.

Females not to be imprisoned for debts unless they exceed 50 dolls. Sess. 34. ch. 302 § 18

XXXV. *And be it further enacted*, That all copies of records and papers in the office of the secretary of this state, certified by the secretary, or his deputy, and authenticated under the seal of office of the said secretary, shall in all cases be evidence equally and in like manner as the original; and the same fees shall be taken for such copies as are now allowed for acts authenticated under the great seal of this state, and shall be accounted for in the manner now prescribed by law.

Copies of records from the office of the secretary of state, certified under the seal o. said office good evidence in courts W 7 4, 104 Sess 32. c. 149 § 3

CHAP. II.—*(R.L.)*

An ACT for the Support of Government.

Passed February 17, 1813.

[R.L.R. v. 1. 532.—Sess. 25. c. 119—Sess. 27, c. 109—Sess. 28, c. 135—Sess. 29, c. 175—Sess. 33, c. 193—Sess. 34, c. 246, 82—Sess. 35, c. 239.]

I. *Be it enacted by the people of the state of New-York, represented in Senate and Assembly*, That there shall be allowed to the several officers of government hereinafter mentioned, the following annual salaries: To the person administering the government of this state, the sum of five thousand dollars; to the chancellor, the sum of three thousand five hundred dollars; to the chief justice, the sum of three thousand five hundred dollars; and to each of the other four judges of the supreme court, the sum of three thousand five hundred dollars; but this provision shall not be construed to extend to any judges of the said court that may be appointed after their number shall amount to five, nor to authorise the increase of such number without special legislative provision for the purpose; to the treasurer, the sum of one thousand seven hundred and fifty dollars, in full for his services and expenses; to

Salaries allowed to the governor, chancellor, chief justice and the other judges of the supreme court. [These officers are also by the constitution, art. XVII, XXII, and XXV.]

Treasurer.

ENCYCLOPÆDIA BRITANNICA

Field, David Dudley

b. Feb. 13, 1805, Haddam, Conn., U.S.
d. April 13, 1894, New York City

U.S. lawyer whose advocacy of law codification had international influence. The "Field Code" of civil procedure, enacted by New York state in 1848, was subsequently adopted in whole or in part in many other U.S. states, in the federal court system, and in England, Ireland (both 1873), and several British overseas possessions, notably India. He was the brother of the financier Cyrus W. Field.

After attending Williams College, Williamstown, Mass., Field was admitted to the bar in 1828 and practiced in New York City. In 1837 he began a campaign for reform of the New York judicial system. Ten years later the state legislature appointed him to a pleading and practice commission, which, with Field as chief draftsman, prepared a civil procedure code and later a code of criminal procedure. Next he was appointed chairman of a commission for codifying the entire body of New York law, substantive as well as procedural. Ultimately he was responsible for five "Field codes," which were adopted completely by California (where his brother Stephen J. Field was then a state supreme court justice) but only in part by New York. He also prepared *Draft Outlines of an International Code* (1872).

As a practicing attorney, Field had some clients who led him into dubious actions. He was nearly disbarred for his activities on behalf of the financiers Jay Gould and James Fisk in their struggle with Cornelius Vanderbilt for control of the Erie Railroad (late 1860s). He also was counsel (1873-78) for the notorious New York City politician William Marcy ("Boss") Tweed.

Information about this topic in other articles:

Field, David Dudley

contribution to American law
Growth of statute law and codes
from common law

Field, David Dudley

Field, David Dudley, 1805–94, American lawyer and law reformer, b. Haddam, Conn.; brother of Cyrus W. Field and Stephen J. Field. He was graduated from Williams (1825), studied law in Albany and New York City, was admitted to the bar in 1828, and soon had a large practice in New York City. After the Civil War he argued before the U.S. Supreme Court several cases involving significant constitutional issues. He was also counsel for Jay Gould and James Fisk in the Erie RR litigation in 1869 and later defended "Boss" Tweed. However, it was his work in behalf of law reform rather than his famous practice that established Field's legal reputation. He was responsible for the New York legislature's appointment in 1847 of one commission to reduce the laws of the state to a systematic code and another to prepare codes of court practice and procedure. Serving on the second commission, Field prepared a code of civil procedure that was adopted (1848–50). This Field code became the basis for the reform of civil law procedure throughout the United States. His reforms—notable among them abolition of the distinction between law and equity proceedings—strongly influenced the English Judicature Acts of 1873 and 1875, which were subsequently adopted by many British colonies. Field's code of criminal procedure eventually became law as well. His commission for the codification of the laws of New York, however, met with failure; consequently, Field became head of a new commission for the same purpose in 1857. He prepared complete civil, political, and penal codes, but only the penal code, in 1881, became law. The civil code several times passed the legislature but was killed by gubernatorial veto.

See biography by his brother, H. M. Field (1898); study by F. C. Hicks (1929, repr. 1966).

Field, Cyrus West

Field, Erastus Salisbury

Code Napolean (The Civil Code)

Part 2: The Civil Code

By Napoleon's time, a confusion of customary, feudal, royal, revolutionary, church, and Roman laws existed in France. Different legal systems controlled different parts of the country. The French writer Voltaire once complained that a man traveling across France would have to change laws as often as he changed horses.

Determined to unify France into a strong modern nation, Napoleon pushed for a single set of written laws that applied to everyone. He appointed a commission to prepare a code of laws. Napoleon wanted this code to be clear, logical, and easily understood by all citizens. The commission, composed of Napoleon and legal experts from all parts of France, met over a period of several years. Enacted on March 21, 1804, the resulting Civil Code of France marked the first major revision and reorganization of laws since the Roman era. The Civil Code (renamed the Code Napoleon in 1807) addressed mainly matters relating to property and families. But these areas of law greatly affected people's lives.

More of this Feature

- Part 1: Historical Background
- Part 3: Napolean's Legacy

Join the Discussion

"How you see this code affecting the French way of life? Was a good or bad thing for Napolean to do? " AB_FRENCHCLT

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- Napolean Bonaparte
- The Bonapartes
- Napolean's Russian Invasion

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- Italy Under Napolean
- Genealogy of Napoléan

The Civil Code writers tried to achieve a compromise between the past and the revolution. The Civil Code eliminated feudal and royal privileges in favor of all citizens' equality before the law. It included some rights such as freedom of speech and worship along with public trial by jury. It allowed individuals to choose their own occupation. But it banned worker organizations, and the employer's word was to be taken over that of his employee.

Most of the 2,281 articles in the Civil Code dealt with the right of property. This was defined as "the right to enjoy and to dispose of one's property in the most absolute fashion." Since the Industrial Revolution had not yet taken hold in France, property mainly referred to land. Although the right to landed property was considered "absolute," some limitations applied. For example, only the legitimate children of a landowner could inherit his land. Furthermore, the landowner's children had to share equally in the inheritance. The Civil Code also adopted the old feudal law that a wife could not inherit her dead husband's land because the "blood family" would then no longer own it.

The Civil Code retained the revolution's law that a civil authority must conduct marriages. (It did not recognize church marriages as legal.) It based many other family laws on traditional and even ancient Roman law. The father ruled his children. A father could veto his son's marriage until age 26 and that of his daughter until 21. Fathers even had the right to imprison their children at will.

Like other legal systems of the time, the Civil Code made the wife legally inferior to her husband: "The husband owes protection to his wife, and the wife owes obedience to her husband." Without her husband's permission, a wife could not conduct any business. Moreover, she could not make contracts. The Civil Code did provide for the idea of community property. This means that a married couple jointly owns all the wealth they accumulate during their marriage, and in case of divorce, they must divide it equally. But the code limited this progressive (although very old) idea. The husband alone legally controlled all family assets during the marriage, including any property his wife possessed before getting married.

The Civil Code permitted divorce on the grounds of adultery, cruelty, criminal conviction, or the mutual

agreement of the spouses and their parents. The revolution had introduced divorce for the first time into France, and the Catholic Church bitterly opposed it. The law of divorce favored the husband. He could get a divorce if his wife committed one act of adultery anywhere. A wife, however, could secure a divorce on grounds of adultery only if her husband committed the act within the family home.

Between 1806 and 1810, Napoleon added a Code of Civil Procedure, Commercial Code, Code of Criminal Procedure, and Penal Code to the ground-breaking Civil Code of 1804. Although they covered a lot, the laws themselves did not go into great detail. Under Napoleon's system, courts must sometimes use reason and logic to interpret how laws apply to certain cases. But the courts' decisions generally do not apply to future cases. This is quite unlike common-law systems. In common-law countries like Britain and the United States, court decisions can become precedents with the force of law. In France, the codes that lawmaking bodies enact are supreme. When the codes need amending, the legislature periodically updates them. For example, the French Parliament established legal equality between husband and wife in the Code Napoleon following World War II.

Next page > Napolean's Legacy > Page 1, 2, 3

Code Napolean (The Civil Code)

Part 3: Naploean's Legacy

Napoleon made his Civil Code the law in territories he conquered, such as parts of Italy and Holland. After his death, the Code Napoleon inspired many other nations to adopt similar law codes.

The Code Napoleon has even influenced the United States, a country steeped in the traditions of common law. In 1808, soon after President Thomas Jefferson purchased Louisiana from Napoleon, American lawmakers in the new territory wrote a code of laws largely taken from Napoleon's Civil Code. This territorial code remains as the foundation of Louisiana state law today.

The code's influence is not limited to Louisiana. Legislators patterned the New York state civil and criminal codes, first completed in 1850, on the Code Napoleon. These codes served as models for similar codes in other states and in the federal government. The old common law was codified, placed in codes.

After defeating Napoleon at Waterloo in 1815, the British imprisoned him on a remote island. Thinking about his career as a general and leader of France, Napoleon remarked: "My real glory is not the 40 battles I won—for my defeat at Waterloo will destroy the memory of those victories. . . . What nothing will destroy, what will live forever, is my Civil Code." The Code Napoleon continues to influence the lives of ordinary people in nearly all parts of the world. Napoleon was right. His most lasting legacy did not turn out to be his military conquests, but rather his foresight in realizing the unifying effect of a code of laws applying to all.

Guide Note: In my research for this feature, I was able to find the Civil Code in French (sorry for you folks who would like to read it in English). It was provided by Jérôme Rabenou. This code has seen many changes throughout the years but we have to credit Napolean for establishing one of the most radical changes of legal precedent in the 20th Century.

See you on the Net!

Previous page > The Civil Code > Page 1, 2, 3

More of this Feature

- Part 1: Historical Background
- Part 2: The Civil Code

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA,

H. TOLER BOORAEM,
REPORTER.

VOLUME 6

WITH

NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

The jury rendered a verdict for plaintiff, for $275, which was trebled by the Court.

Defendant appealed.

E. R. Carpentier, for Appellant.

S. S. Chipman, H. S. Foote, A. G. Wilson, A. Williams and E. Cook, for Respondent.

The opinion of the Court was delivered by Mr. Justice TERRY. Mr. Chief Justice MURRAY concurred.

The decision of Zander v. Coe, (5 Cal. 230), limiting the jurisdiction of justices in civil cases, does not apply to proceedings under the statute concerning forcible entry. The motion for non-suit was properly overruled, as there was abundant evidence introduced by plaintiff to justify a verdict in his favor.

The points that the pleadings were insufficient to justify the judgment, and that the Court erred in trebling the damages assessed by the jury, have heretofore been decided in the case of O'Callaghan v. Booth, at the October term, 1855, *ante*, 63.

Judgment affirmed, with costs.

CHIPMAN v. HIBBERD.

In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them.

This damage should be estimated by all the circumstances, and the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury.

APPEAL from the District Court of the Fourth Judicial District.

Action for damages for cutting down growing trees. The opinion of the Court discloses the error upon which the judgment of the Court below is reversed.

E. W. F. Sloan for Appellant.

Chas. H. S. Williams for Respondent.

The opinion of the Court was delivered by Mr. Chief Justice MURRAY. Mr. Justice TERRY concurred.

The Court erred in laying down the measure of damages. The true rule is not the actual value of the trees for firewood, but the damage done to the land by reason of destroying them. This damage should have been estimated by all the circumstances, and the purposes for which the trees were used or designed, and not according to the "speculative or fancied ideas" that the jury or plaintiff might have drawn of their worth.

Judgment reversed, and new trial ordered.

RICH v. DAVIS & CO.

Where a mining company, not incorporate, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm.

Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm.

APPEAL from the District Court of the Tenth Judicial District, County of Nevada.

The Flushing Mining Co., composed of eleven members, formed a partnership with Hamlet Davis, for trading, under the firm name of Davis & Co. Israel J. Hirst, a member of the mining company, acted as salesman in the store of Davis & Co. Davis and the Flushing Mining Co. each put in an equal amount of capital. Dysart and Voorhies, two members of the latter, attended to the business for the Company. Hirst executed a promissory note in the name of Davis & Co., which passed by endorsement to the plaintiff, and on which this action is brought. Hirst had on a previous occasion signed the firm name to a certificate of deposit, which had afterward been paid by the head of the firm.

The case was tried in the Court below without a jury. The above facts appear in the finding of the Court, upon which it gave judgment for defendants. Plaintiffs appealed.

McConnell, and Robinson, Beatty & Sackett, for Appellant.

Buckner and Hill, for Respondents.

The opinion of the Court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY concurred.

The facts found by the District Court establish that Hirst was a member of the "Flushing Mining Company," the members of which, together with Davis, constituted the firm of Davis & Co., in whose name the note was executed by Hirst. This makes Hirst beyond controversy a member of the firm of Davis & Co.

The only remaining question is was he such a dormant partner as would prevent his [illegible] and the findings show that on one occasion he had signed [illegible] was afterwards [illegible]

Slighter circumstances [illegible] to establish [illegible]

THE

REPORTS

OF

THAT REVEREND AND LEARNED JUDGE, THE RIGHT HONORABLE

SIR HENRY HOBART,

KNIGHT AND BARONET, LORD CHIEF JUSTICE OF HIS MAJESTY'S COURT OF COMMON PLEAS, AND CHANCELLOR TO BOTH THEIR HIGHNESSES HENRY AND CHARLES, PRINCES OF WALES. . .

FIRST AMERICAN,

FROM THE FIFTH ENGLISH EDITION,

WITH

NOTES, AND REFERENCES TO PRIOR AND SUBSEQUENT DECISIONS,

BY JOHN M. WILLIAMS,

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS OF MASSACHUSETTS.

BOSTON.
HILLIARD, GRAY, LITTLE, AND WILKINS.

1829.

LIS - 10

[140 b]

STUKELEY *vs.* BUTLER.

DE TERMINO, &c.

Of advowsons, &c.

COLT & *al. vs.* BISHOP OF COVENTRY, &c.

Called the great case of the *commendam*.

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[165]

WINCHCOMBE *vs.* BISHOP OF WINCHESTER, &c.

Concerning the English law of simony.

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[168]

STUKELEY *vs.* BUTLER.

Somerset. Walter.

A *scilicet* cannot restrict a grant where the former words are express and special. *Secus*, where the former words are so indifferent that they may receive such a restriction without apparent injury.

A *scilicet* may particularize what before was general, or distribute what was in gross, or explain what was uncertain; but it must not be inconsistent with the premises.

Where the premises of a grant are special and express, they cannot be restrained or frustrated by a distinct clause of the instrument; *secus*, where the premises are general and implied.

One part of a continued or connected clause or sentence may be restrained or frustrated by other parts of the same clause or sentence; but where there is a grant of a particular thing, once sufficiently ascertained, the addition of an allegation, mistaken or false, concerning it, though in the same sentence, will not frustrate the grant.

After a grant, an affirmative covenant of the grantor does not restrain the power or take away any interest of the grantee.

A grant of all the wood growing on the grantor's manor, which can be conveniently spared without prejudice to the estate, is void for uncertainty. *Semb. Secus*, of a covenant or executory grant that the covenantee may take such trees.

Moor. f. 880.

SIR THOMAS STUKELEY brought an action of trespass against Robert Butler, for selling of certain oaks and ashes, &c. at old Cleave; whereunto the defendant pleaded not guilty; and upon a special verdict the case was thus. 'The Earl of Sussex, 36 Eliz. was seised of the manor of Cleave, whereof a messuage called Stout, and one hundred acres usually occupied with it, and seven hundred more, and certain woods called Blagrave, Pitchill, Erridge, Bore, and Readwood, all lying in Cleave, were

parcel; and the same year did demise unto Robert Butler and Julian his wife, and Robert their son, now defendant, the said house and all the lands, and Blagrave and Pitchill wood, for their lives, (excepting all timber trees;) and then, the same year, by indenture, did bargain and sell to Edward George, *omnia illa, boscos, subboscos, maeremium et arbores sua tunc stant. crescen. et existen. in et super toto illo manerio suo de Cleave, in dicto com. Somerset, viz. in et super tota illa copicia sua, sive bosco vocato le Erridge Wood, cont.* 24 *acr., et in et super toto illo bosco vocat. Boorwood, cont.* 10 *acr., ac in et super toto illo bosco suo vocat. Blagrave Wood, cont.* 6 *acr., et etiam in et super toto illo alio bosco suo vocat. Pitchill Wood, cont.* 7 *acr. una cum omnibus aliis boscis et subboscis, maeremio et arboribus stant. et existen. super præd. manerio de Cleave quæ convenienter parcari poterint et succidi sine præjudicio et damno ad statum et manuten. Anglice*, the state and maintenance, *dicti manerii de Cleave*; and a covenant of the part of the Earl, that the said George and his assigns, during five years, may fell and carry the woods without interruption of the Earl, or any others; and to make sawing pits, and to square and cut the timber upon the ground during the said term; and a covenant on the part of the lessee, that he should fill up the pits, and make all things fair, and amend the fences that should be broken during the said term of five years. Then George, ann. 38. did bargain and sell all the woods to Prowse; and Prowse, the same year, did bargain and sell to Robert Butler, the father, all the woods in Blagrave and Pitchill Wood, and in the seven hundred acres; so the woods in the hundred acres, going with the house, and in the other three woods, remain still with Prowse; who after, *anno* 40 Eliz. did bargain and sell unto the Earl of Sussex all the woods by him sold unto George, except those he had sold, as aforesaid, to Butler the father. Then Butler the father, by his will, did give unto Butler his son, the defendant, his woods. And the earl, 30 Jac. did bargain and sell by deed enrolled, unto Sir Thomas Stukeley, the reversion of the said lands, and all

[168 *a*]

[169]

[169 a] his woods, for two thousand four hundred and twenty pounds, to which Butler the father attorned; and then he and his wife died, and Robert Butler the son, and Lewis the other defendant, as his servant, by consent of Trevilian and others, the executors of his father, felled certain of the trees in the declaration, which was timber at the time of the grant in Blagrave Wood and Pitchill Wood, and other of the trees in the seven hundred acres.' And the jury assessed damage severally for the trees severally felled in either wood, and for those in the seven hundred acres, which was well and advisedly done.

Upon this whole cause I am of opinion, that the defendant had good title to all the trees felled, as well those in the seven hundred acres, as in the two groves; and that therefore the plaintiff is to be wholly barred.

The first point, or question.

I make but two questions; the first, whether the *viz.* hath power to restrain the general grant of all the woods upon the whole manor, to the woods only growing upon the five groves; or that the same general clause being certain and express shall make void the *viz.* And I am of opinion, that the *viz.* as the whole sentence is, is utterly void.

The second point, or question.

The second question is, whether the covenant on the part of my lord of Sussex with George, to take the trees, &c. within the five years next after the grant, shall so check and control the grant, that he may not take the trees after the five years; and I am of opinion clearly that it doth not control the grant, but that as the trees are absolutely given, so the bargainees and their assigns may take them when they will.

Thirdly, I will give you my opinion concerning that part of the clause that runneth under the *una cum omnibus aliis*, &c. upon which I hold that that part of the clause giveth nothing, because it is void for uncertainty; and yet it hurteth not the former clause, because it is distinct, and standeth of itself, divided in his power and operation from the other.

The first point, or question.

As to the first point, whether the *viz.* doth restrain the general grant of all the woods, upon all the manor, to the woods upon the copices only.

I am of opinion clearly, that it doth not; and therefore I will consider first, in general, how the premises of a grant may be checked, restrained, corrected or explained. [169 b] The force and use a viz.

It may be corrected or restrained by a divided clause, or by a connexion of one clause.

By a divided clause, either in the thing given, by an exception, or in the state given, by an *habendum*. But both must be where the premises of the grant are not special and expressed, but general and implied, as to the purpose restrained. [170] Co. L. 47. a.

And therefore though the law says, that when a man grants lands, he grants the underwoods inclusively, and so when he grants his house, he grants all the several rooms in the house; yet M. 33 and 34 Eliz. in the King's Bench, between Kenisham and Redding, the case was, that the queen leased the parsonage of Greenwich, with all the lands and underwoods expressly thereunto belonging, (*exceptis omnibus grossis arboribus, boscis, et maeremiis.*) The opinion of the court was, that the exception as to the underwoods was void. But they held that the exception was only to be extended to great woods. So is the case, 9 Eliz. 265. of a lease of a house and shops, (excepting the shops;) which proves that the rule, *expressio eorum quæ tacite insunt nihil operatur*, is to be understood having respect to itself only, and not having relation to other clauses. 1 Leo. 247. 3 Cro. 244. 2 Roll. 454. 2 Ro. 454.

So a lessee may be restrained by a condition not to alien, 21 H. 6. 33. but not if the lease be to him and his assigns; as an office of trust to one and his assigns gives power to grant it over. Dyer 6. 45. 3 Leo. 67. Latch. 20. Cr. Jac. 460. Mo. 881. 1 Leo. 3. 3 Cro. 26. 1 And. 123.

A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed, nor in anything implied, which is of his nature incident, and inseparable from the thing granted.

And therefore Sir Anthony Mildmaye's case, Co. lib. 6. 40. a gift in tail, upon condition not to suffer a common recovery, it leaves you the land and the estate; but it takes away a liberty which is inseparable from the estate, Dy. 264. b.

[170 *a*]. as to a fee, not to alien. And a grant of a house, upon condition not to meddle with the shops, is void; for this doth not, as an exception, reserve the shops to the lessor, and from the lessee; but leaves them in the lessee, and then forbids the use of that it hath made his, which is repugnant. So upon Whistler's case, Co. lib. 10. 63. though it be well said, that when the king grants a manor, *cum pertinentiis*, it no more passeth the advowson than if it were expressly excepted; yet the words *adeo plene*, &c. will carry it in the one case, not in the other, when it is excepted. So *è converso*, the manor *adeo plene* will admit an exception of the advowson, not if it were expressly granted.

5 Co. 11. b.

Upon the same reason is it, that if you demise a manor, you may, by an exception, pare away as much of the demesnes, or services, or both, as you will; but you must leave it still a manor, having some demesnes, some services, and a court. This I mean, when that that you have is such a true manor, as hath both demesnes and service; for though a manor may stand and pass by that name, that is but titular; yet your grant shall be taken, as the thing is that you grant.

Dy. 97. p. 45. 238. p. 54. Co. L. 47. a. 3 Cr. 792. Ant. 108. Mo. 870. Finch. 53.

Again, by an exception you shall not make the whole grant frustrate, though the grant be in general words. And therefore, if you have but one close in *D.* and you demise all your land in *D.* (excepting that one close) the exception is void.

1 Cr. 130. Ante 72. 3 Cro. 244. 2 Ro. 454.

18 Eliz. in the King's Bench, Dorrel brought an ejectment against Collins, in Lamberhurst in the county of Kent. The jury found, that the masters and scholars of Linkford were seised of the land in question, being part of the manor of Hothley in Lamberhurst, and that they did demise all their lands in Lamberhurst, excepting the manor of Hothley, under which the plaintiff claimed; and they found, that Lamberhurst did extend to Kent and Sussex, and that the master, &c. had no land in Lamberhurst but the manor of Hothley; and it was adjudged that the lease did carry the manor of Hothley, and that the exception was void; and also, that the jury, being only of Kent,

3 Cro. 6.

Co. L. 47. a.

ought to find that they had no lands in Sussex, as well as in Kent; because the issue, guilty or not guilty, depended upon it; otherwise, where a local thing in another county is specially put in issue. [170 *b*] 6 Co. 47. a.

Like law is of the use of an *habendum*, that if by your premises you have given no certain nor express state, than that otherwise the law would give, you may alter and abridge, nay you may utterly frustrate it by the *habendum*. [171] And therefore in the case of Hodge and Crosse, M. 33 and 34 Eliz. in the king's bench, one Warren made a feoffment of lands in London, *habendum* to the feoffee and his heirs, after the death of the feoffor; and upon argument the feoffment was ruled to be void. Cr. El. 254. Ro. 2. Ab. 66. 10. Palm. 30. Mo. 423. 2 R. 55. t. 5 R. 94. t. Co. L. 48. t. Plo. 156. a.

And yet in the case of Underhay and Underhay, Hill. 34 Eliz. in the king's bench, the case was, that one having leased his land to three for their lives, granted the reversion, *habendum* to the grantee for his life, and then added these words, 'which said estate for life to begin after the death of the three first lessees.' And that was adjudged a good estate in reversion for life. 3 Cro. 261, 269. 2 Ro. 66. Jones, 349. 1 Cr. 367. Bacon's Elem. 56. Grants, B. 60. Plo. 520, 156. a. 250. b. 1 Cr. 165. Dy. 272.

Neither can you by an *habendum* frustrate a grant that was complete before; as the case is 7 Ed. 6. where a lessee for years granted all his estate, *habendum* after his death. So much of divided clauses. 3 Cro. 255, 535. 2 Co. 23. b. 1 Co. 155. a.

But now of one clause carried on with a connexion, so as they make but one entire sentence till the whole be finished, the law is otherwise; for one part of the sentence may not only abridge and correct, but utterly frustrate and make void, the whole grant. And therefore if a lessee for years grant his term after his death, the grant is void. 1 Cr. 130, 473, 546. Cr. Jac. 459. 3 Cr. 300, 2 Cr. 48.

So in Doughty's case, Co. lib. 3. 9, the case was, that the duke of Northumberland was seised of divers houses and cottages in the parish of Saint Sepulchres, London, and bargained and sold all his tenements in the parish of Saint Andrews, Holborn, in the tenure of one William Gardiner, unto one Lea; and the grant was judged void, though those houses were in the tenure of Gardiner, which was the point judged. But where it is added, in

[171 a] that case, that the court was of opinion, that if he had begun with the tenure of Gardiner, which was true, and ended with the parish mistaken, that the grant had been
Bacon, 90. good by the rule *utile per inutile non vitiatur*, I hold it plain contrary; for the several circumstances and descriptions circumscribe and ascertain the grant. And it is a good rule, *incivile est, nisi tota sententia perspecta, de aliqua parte judicare.*

And therefore the judgment in Doddington's case, Co. lib. 2. 32, 33. is full in the point. H. 8. was seised of the hospital of Welles, whereof certain lands in Dindace, out of the circuit of Welles, which were in the tenure of John Browne, were part, and he granted unto Ailworth all his lands in the tenure of John Browne, situate in
1 Leo. 21. Welles, to the said hospital belonging. And it was adjudged, that though the first part of the description, as it was placed in the patent, in the tenure of Browne, were true, yet the latter part (being false) marred all, even if it were the grant of a common person. And indeed in one sentence it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at
3 Cro. 255. once, which gives *vitam et modum* to the sentence.
1 Leo. 473. Plo. 191. b. 10 Co. 113. a. Dy. 292. Bac. 91. 4 Co. 48. b. 50 a. Dy. 87. a. But in grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false. (1) As Pas. 23 El. Dyer 376. One made a feoffment by attorney of a messuage in *D.* which was R. Cotton's, and

(1) This doctrine is recognized and established by decisions in numerous cases which are cited and discussed in 5 East 51, Roe v. Vernon. When the description of an estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every particular of the description. Thus if a man grant all his estate in his own occupation in the town of *W.* no estate can pass except what is in in his own occupation, and is also situated in that town. But if a man convey his house in *D.* which was formerly *R. C.'s*, when, in fact, it was not *R. C.'s* but *T. C.'s*, the house in *D.* shall pass, if the grantor had but one house in *D.*; because by the description of his house in *D.* the estate intended to be conveyed is sufficiently ascertained. 4 Mass. 205, Worthington v. Hyler. The principle is also recognized in New York, in the case of Rogers v. Clark, 7 Johns. 217. 18 Johns. 60, Jackson v. Root. 18 Johns. 81, Jackson v. Loomis. 19 Johns. 449. S. C. in error.

indeed it was Th. Cotton's; yet it passed; for else all was to be frustrate; but a thing certain may be diminished, though not wholly made void; as in Ognell's case, C. lib. 4. Rainsford possessed of a term in Cruel Grange, whereof part, that is to say Hobsfield, came to one Freckelton in possession for part of the term, and to one Beer for the rest of the term in reversion; and a rent charge was granted out of *Cruel Grange, nuper in tenura Rainsford, et modo in tenura et occupatione Beer;* this did not charge Hobsfield, but it charged the rest, and so there was no repugnancy. [171 b]

Now I come to the use of a *viz.* or *sc.* or in the English *that is to say*, and the nature and force of it. It is neither a direct several clause, nor a direct entire clause, but it is *intermedia*.

First it is clear, that it is not a substantive clause of itself; and therefore you can neither begin a sentence with it, nor make a sentence of it by itself; but it is (as I may say) *clausula ancillaris*, a kind of handmaid to another clause, and to deliver her mind, not her own. And therefore it is a kind of interpreter; her natural and proper use is to particularize that, that is before general, or distribute that, that is in gross, or explain that, that is doubtful and obscure. [172]

First it must not be contrary to the premises, as 20 H. 6. Trespass with a *continuando*, till the day of the writ purchased, *sc.* such a day, which is not the same, is utterly void. 1 Saund. 118, 169. Yelv. 93, 94. 1 Syd. 370. 1 Saund. 216. Yelv. 94. 2 Cro. 96, 104, 428, 429. 3 Cro. 368.

Next it must neither increase nor diminish, for it is not the nature of it to give of itself. As if I have in *D.* black-acre, white-acre, and green-acre; and I grant unto you all my lands in *D.* that is to say, black-acre and white-acre; yet green-acre shall pass too; but if I add under the *viz.* land lying out of the town of *D.* it shall not pass. And therefore see 29 Assize 23. Upon a partition between three partners in chancery, one of them for a surplusage, granted unto the other two a rent of five pounds a year; that is to say, to the one fifty shillings,

[172 a] and to the other as much; yet it was judged an entire rent. And 29 E. 3. 39, it is holden, that if I grant a rent of twenty shillings out of two manors, *sc.* ten shillings out of one, and as much out of another, it is but one rent. So are Knight's case, Co. lib. 5. 55, and Winter's case, 14 Eliz. Dyer 308, upon a difference where the rents are reserved severally at the first, and where they are at the first entire, and taken by a *viz.*

Cr. Car. 154. Cr. Jac. 341.

So 18 El. Dyer 350. An obligation of two hundred pounds to two, *solvend.* the one hundred to the one, and the other to the other; the book leaves a *quære;* but it is clear, a void *solvendum.* So Hill and Grange's case. A lease made in April, for example, rendering a yearly rent (that is to say) at our Lady-day, and Michaelmas; the yearly payment cannot be diminished. Osborn's case, Co. lib. 10. 13. An *anglice,* (which is but a *viz.* or *that is to say,*) shall never exceed the Latin.

Mo. 64. Yel. 177. Co. L. 217. b.

But now I grant on the other side, that a *viz.* may work a restriction where the former words were not express and special, but so indifferent as they may receive such a restriction without apparent injury; though those former words, by construction of law, would have had a larger sense, if the *viz.* had not been; and therefore see 7 E. 3. 9. Mortimer's case. One granted ten pounds of rent (note, not a rent which must (as I have said) be understood one rent of ten pounds) in his manor of *D.* to receive by the hands of one tenant so much, and so from one tenant to another, till he made up ten pounds, saving his signiory. And the opinion of the court was, that this was but a grant of the several rents of those tenants, as rent *seek* by this *viz.* which had been otherwise, if it had left at the premises without the *viz.* for then it would have been a new entire rent of ten pounds out of the whole demesnes of the manor. But I am of clear opinion, that if the particular rents in the first case had made but five pounds, that then the premises would have taken place, and the *viz.* had been void. Like unto the case of 15 Ass. 11. and 15 Ed. 3. Fitz. Charge 9. If *A.* grants twenty shillings rent in his

1 Saund. 170.

manor, *viz.* by the hands of one so much, and of another so much; and the tenants assigned are but tenants at will, the whole manor is charged; for the *viz.* being of no effect, is void in law; for itself being of no effect, cannot frustrate the premises, which are of sufficiency of themselves. 8 Ed. 3. 59. One gave land to *A.* and *B.* *habendum* to *A.* for life, and after his decease to *B.*; this was holden good. So Littleton 66. If a man give land to two, *habendum* to them, *sc.* the one moiety to the one, and the other moiety to the other, it is good. For note, that the substance of the premises is not altered; for both of them have the whole in use, in common, as they should have had it by the premises jointly, which is but a point of quality, or accident altered. But if it were twenty acres to two, *sc.* ten to one, and ten to another, it were void. So upon the cases 21 H. 6. 7. and 13 H. 7. 24, I hold, if I grant land to one and his heirs, *viz.* the heirs of his body, it is an estate tail. So 13 Eliz. Dyer 299. In a *quare impedit* one is pleaded seised of a manor, to which the advowson appends, *viz.* to present in the third turn; it is good: but if one seised of a whole advowson should grant the whole, *viz.* to present every third turn, the *viz.* were void. So upon the case 9 Eliz. Dyer 261, if a man have lands in a hamlet, and other lands in another part of the town; if he grant his lands in that town, *sc.* in the hamlet, I hold that no more will pass. But if he grant all his lands in the whole town, *viz.* in the hamlet, all the land will pass, and the *viz.* is void. And 6 Edw. 6 Dyer 77. the king granted *situm abbatiæ nec non omnia terr. prat. pastur. et subscript. dict. monasterio pertinen. viz.* such a close, and such a close; and the opinion is that the *viz.* shall only serve to explain the word *subscript.* and that all other the lands belonging to the monastery shall pass by the express words.

[172 *b*]

2 Cr. 97. Dy. 10. b. 361. a. Post. 315. 8 Co. 93. b. Ro. 2. 65. Mo. 25. 3 Cr. 38. 1 Leo. 10. bon. case. Dy. 125. b. 160. b. Palm. 34. 1 Inst. 183. b. Mo. 44.

Finch. 58. utra.

Co. L. 21. a.

Mo. 167.

[173]

Cr. Jac. 110.

1 Leo. 120. bon. case. Cr. Car. 21.

Now to the second great point, which is, whether the covenant on the part of the grantor, for the five years, do disable the grantee, or those that claim under him, to take the trees after the five years expired.

The second great point. Mo. 25, 882.

[173 *a*] I will say little, for I declared myself, in the beginning, not to hold that questionable, neither do I yet. (2)

For first it is clear, that by the grant of the trees by a tenant in fee simple, they are absolutely passed away from the grantor and his heirs, and vested in the grantee, and go to the executors or administrators, being, in understanding of law, divided as chattels from the freehold; and the grantee hath power, incident and implied to the grant, to fell them when he will, without any other special license, which can never be restrained by a power given by the grantor in the affirmative, which the grantee had before.

4 Co. 30. b.

And therefore, 8 Ass. 10. one granted a rent of ten pounds a year to the husband and the wife for their lives; and if the wife survive, that then she shall have three pounds a year for her life; and judged she should hold her ten pounds a year; otherwise, if it had been said that she should have three pounds a year, and no more. And so Trin. 28 H. 8. Dyer 19. the lessor covenanted that the lessee might take thorn by assignment of the bailiff; yet he may take without; otherwise if it were in the negative.

Mo. 7.

2 Cro. 481.

Statutes that are taken by intent, shall not, by an affirmative, alter a former power. 33 H. 8. Dyer 50. The stat. 27 H. 8. 17 Eliz. Dyer 341. hereafter.

Now the grant implying an absolute liberty to the grantee to take, if the covenant were on the part of the lessee, not to take after the five years, it would not extinguish his property, nor consequently his power, to take them after the five years; and therefore if he took them, he might plead not guilty in trespass, but should be answerable to an action of covenant for it; for things have their proper effects and considerations, and several respects of actions are not to be confounded. And therefore, 3 Eliz. Dyer 199, if the lessor covenant to repair the house at his proper costs; or again, if the lessee covenant

3 Co. 82. a.

(2) General words in a grent are not restrained by restrictive words added *ex majori cautela*, or by affirmative words more restrictive, but which have no tendency to render a general description ambiguous or uncertain. Com. Dig. Parols, A. 23. 11 Mass. 167, Bott v. Burnell.

to repair the house at his proper costs in timber work, and the like, yet in both cases, if he felled timber to repair, there is no change in the remedy by action of waste, but by action of covenant. [173 *b*]

The statute of 27 H. 8. of court of augmentation, all grants of lands, within their survey, shall be sealed with that seal; yet see 33 H. 8. Dyer 50. for want of a negative; much more if it had been 'may be sealed,' as here. 17 Eliz. Dyer 341. the late monasteries were given to the king; *proviso*, to avoid fraudulent leases within the year of the dissolution, and another *proviso* in the affirmative, that leases with the ancient rent shall be good; yet judged that a lease within forty days, without ancient rent, was good, for they had lawful power before, and there is no negative.

Lastly, this covenant on the part of the grantor hath its necessary use, though it work nothing in the restraint of time for felling; for it gives power to dig, and make saw-pits upon the ground, and to square the timber there, which the grantee could not do by the simple grant of the timber, without such a special warrant. Also it contains a general warranty, that the grantee may take and fell timber, without the let or interruption of any person or persons whatsoever.

Now to the third and last point; if the clause had been that the earl had granted all his woods and underwoods, growing upon all his manor of Cleave, which could conveniently have been spared without prejudice to the estate of his manor, I should be of mind that this grant were void. (3) [174] The clause *una cum omnibus aliis.*

And yet it is true, that many things that are uncertain of themselves, being reduced to certainty by such means as either the law appoints, or the party himself assigns, may take effect; and therefore the cases put are clear, that the fine of a copyholder being uncertain, shall be made certain and reasonable by the jury and the court, 2 Ro. 65.

(3) *Quære* whether a *grant* of all the wood, &c. in the words of the text, would not be construed as a covenant that the grantee may take the wood, and thus be valid as a covenant, though void as a grant?

[174 *a*] upon the circumstances of the case. So of convenient time of remove upon the death of a tenant for life. 41 E. 3. barr. 205. In trespass for eating his corn, the defendant pleaded that he had common, and the other left his corn there, after other men had carried, and it was ready to be carried, &c. of evil will, &c.; the plaintiff, that it was not dry, &c. But note, that all these, and the like, are provisions in law, for acts in law. Also I grant, that if the Earl had covenanted or granted, that George might have taken such trees as might conveniently have been spared without prejudice, &c. that this being but a covenant, or grant executory, he might have taken trees by force of it, and have justified, specially averring that they might be spared, and put himself upon the jury for it. But our case is not of that nature; but it is a grant or bargain which must take effect, and change the property of the thing granted, either presently and at once, or *inchoative*, depending upon somewhat that shall reduce it to his full effect; which when it is done shall make the grant good *ab initio*.

20 H. 7. Case Strat. Mare Co. L. 45. b

And if I make a lease to *A.* for so many years as *I. S.* shall name, or grant such liberties as another town hath, both these, at the time of the grant, appear in case to be made certain, and the common cases of grants that take the perfection by elections given by the party, or by the law, to certain persons.

The same books and reasons that prove, that when the election creates the interest, nothing passes till election, the same prove that where no election can be, no interest can arise.

1 Le. 254. Apr. 222.

Bullock's case, 10 Eliz. Dyer 281, feoffment of a house and seventeen acres, parcel of a waste; the feoffee, not his heirs, must make his election, or else the grant is void: and 2 H. 7. 23. So Hayward's case, Co. lib. 2. 36. If I give thee one of my houses, nothing passes till the donee choose; therefore he must do it; his executors cannot. '44 E. 3. 43, is a good case. A prior sold his woods, excepting forty of the best oaks, at his choice, to be taken within two years; then the prior brought an action of trespass

5 Co. 25. a.

against the vendee for selling them. He pleaded, that the plaintiff delaying his choice till the two years were almost expired, that he could forbear the felling no longer, but his two years would expire, and therefore required him to make his choice; but he refused; whereupon he chose forty of the best himself, and left them standing, and took the rest. [174 *b*] 5 Co. 25. a.

So note, that the vendee in this case had no property till election or default made by the vendor, which was supplied and made certain by the vendee; and yet the vendee could not have made the choice in default of the vendor, till the time incurred so near, that he must needs, and that must be put upon judgment of the jury or court, upon special declaration of the time, and the number of the trees, and the like. But here he cannot change property presently of any trees certain, because it is uncertain which trees may be spared, and which not; and divers trees may be spared, and indifferent whether these or those, and there is no person to whom it is given to determine which may be spared, which not. But if the grant had been of such trees as *I. S.* should judge might be spared, it might have stood with his determination. *Primo Mariæ*, Dyer 90. A sale of woods which may be reasonably spared. 7 E. 6. Term that shall be to come after his death, uncertain and apparent, that at the time of the grant it is not referred to certainty. 22 H. 6. A grant to two, *et hæred.* void. 2 And. 142. Mo. 382. Dy. 91. a. 1 Ro. 55. 2 Cr. 262.

But the defendant hath pleaded not guilty, which he cannot maintain, unless the trees were actually his before he felled them; for if it had been but a liberty to fell, he must have pleaded it, and not pleaded not guilty. [175]

Also he must have averred, that they might have been spared, which is not pleaded nor found by the jury. And so the defendant pleaded, *primo Mariæ*, Dyer 90.

Now though I am of opinion as before, that this last clause is void for uncertainty; yet I hold clearly, that it reaches not to the first clause of grant, upon which I have argued and concluded for the defendant; but looks back only to the last clause, beginning at *una cum omni-*

[175 a] *bus aliis boscis, &c.* which though it be frustrate, yet the first clause stands perfect of itself; for it is true, that if a grant be carried in generals, which of itself is not certain, if that by the other parts of the same entire sentence in point of description, or other declaration cannot be true, as in Doughtey's and Darrington's cases before, or cannot be effectual, as in this conclusion of uncertainty, or be restrained by a conclusion, as in Finch's case, Coke lib. 6. 39. mark the sentence.

Dy. 207. p. 14. Godb. 16. p. 23. Goldsb. 99. p. 3. The rent of twenty pounds a year was granted by the lady Finch to her son, in these words, 'Out of the manor of Eastwell, Otterplea, Potbury, and Seaton, and her lands lying in the parishes of Eastwell, Westwell, and Challock, or elsewhere in the county of Kent, to the said manor, or any of them belonging;' clearly this charged no other lands in those towns, but such as belong to the manors; for it is plainly one only entire compacted sentence, so woven and interlaced together, as there is neither division in words nor sense, and that is a joining of the sentence to good use, and not to avoid all.

Note, these cases are of one entire and compacted sentence, and therefore one part may overthrow or restrain another. But our case hath two clauses that are clearly distinct.

First, a grant of all those his woods standing upon his whole manor, which answers the pronoun *illa*, being resolved thus; all those woods which stand,—to that clause, I join the *viz.* as a hand maid, as I said, though it be void.

Yelv. 82. 1 Cr. 47. Then comes the second clause, *una cum omnibus aliis boscis, &c.* which in law, though it be governed by the first words of grant, yet that word of grant is respectively as several grants of several things. And it is all one as if he had said, he granted all the woods growing upon his whole manor, and he also granted all other his woods that might be conveniently spared, &c. And in that case of Finch it is granted, that if I grant a rent in this form, issuing out of my manor of *D.* and out of my lands

6 Co. 39. b. and tenements in *D.* and *S.* and out of my lands elsewhere to the said manor belonging; that this middle

clause stands so in frame divided, that it shall charge my lands in those towns, though they be no part of the manor; and yet that clause is enclosed with the manor, both before and after; much more here, where the first general clause stands clear by itself, and the second clause, under the *una cum omnibus aliis*, is a new addition, and of other things than were before granted, and hath his conclusion, with *convenienter*, &c. attending upon it. [175 *b*]

TOPSALL *vs.* FERRERS.

A custom of a parish that if a passenger die there, the fees of his burial shall be paid there, though he should be buried elsewhere, is unreasonable and void.

EDWARD TOPSALL, clerk, parson of Saint Botolphs without Aldersgate, and the churchwardens of the same, libelled in the court christian against Sir John Ferrers, knight; and alleged, that there was a custom within the city of London, and especially within that parish, that if any person die within that parish, being man or woman, and be carried out of the same parish, and buried elsewhere, that there ought to be paid to the parson of this parish, if he be buried elsewhere, in the chancel so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them, for such as were buried in their own chancel; and then alleging, that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demand of him the said sum. Whereupon for Sir John Ferrers a prohibition was prayed by serjeant Harris, and upon debate it was granted; for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or to pay as if he were; and so upon the matter to pay twice for his burial. [176]

Libell. Eccl. Winch Ent. 389. 1 Ro. 559. Custom of the parish, that a passenger dying there, should pay fees there, though buried elsewhere. Mod. R. 48.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

By OCTAVIUS PICKERING,
COUNSELLOR AT LAW.

VOLUME XIII.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
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Wright v. Barrett.

made in favor of the daughters, or in other words, to the interest and privileges therein devised to the daughters. So that the same rule, which ascertains the extent of this interest, determines the limits of these incumbrances.

It is well settled, that a grant or devise of an interest in growing wood is an interest in the soil itself.

Then the question is, what interest in these wood-lots, did the testator intend to give to his daughters. It is readily admitted, that the intent of the testator is the governing rule in the construction of a will, but that intent must be gathered from the will itself, taking every part and clause of it for this purpose, and is not to be sought for elsewhere.

It is contended that the privilege of cutting all fire-wood, that might be necessary for the daughters, was intended to be connected with the provision, that they were to have an interest and home in the dwellinghouse so long as they should remain single; and when they married, both privileges ceased together. Such might have been the testator's intention, but we cannot infer any such intention from the terms of the will. After the provision in relation to the right in the house, there is another bequest of personal property, absolute in its terms. There is nothing in the clause itself giving the privilege of cutting wood, to limit it to the time whilst they should remain single. There is nothing therefore, in the terms of the devise, or its collocation or connexion with the former clause, to warrant the Court in extending the limitation in the former clause to the latter. *Right* v. *Compton*, 9 East, 267. This devise therefore, we think, gives the same interest, as if the former devise had not been made; and this was an interest to each of these daughters as tenants in common, for their respective lives, to cut as much wood as should be necessary for them respectively; and this right was not taken away or impaired by their respective marriages, but like other rights and interests of like kind, vested in the husband in right of the wife, during the coverture. What may be the effect of the term "necessary," in limiting the quantity of wood, may admit of some doubt when the question arises.

Wright v. Barrett.

But it has been admitted in the argument, that if by the terms of the will the two daughters were not to live together, and keep their fires together, but each had a several right, then that the quantity taken by the defendant has not been beyond that contemplated by the will. Being of opinion, that the right was several, and that it did not depend upon their living together in the mansion-house, we in effect decide, that the quantity taken did not exceed what the defendant might lawfully take, in right of his wife and her sister.

The opinion thus expressed, in effect decides the other question made, upon the operation of Mrs. Adams's release. As the interest in the wood-lots, or the privilege of cutting wood, was a distinct interest from that in the dwellinghouse, her release of all her right, title or interest in the dwellinghouse and home estate, as described in her father's will, was not a release of her interest in the wood-lots.

Plaintiff nonsuit.

BENJAMIN BARRETT *et ux. et al. versus* THEODORE WRIGHT.

A testator owning stock in a bank, which by its charter was to expire within a few years, bequeaths the stock to his two daughters, one of whom was a widow, the other a feme covert, but directs that it shall stand in the name of his executor until the expiration of the charter, the executor paying to the daughters the dividends on the stock. The charter was renewed. It was *held*, that when the time arrived which had been fixed for the expiration of the original charter, the daughters were entitled to have the stock transferred to them.

Parol declarations of the testator, shewing that he did not think that the charter would be renewed, were held to be inadmissible in evidence to affect the construction of the will.

BILL *in equity*, brought by Benjamin Barrett and Mary Barrett his wife, and Sarah Adams. Mary Barrett and Sarah Adams were daughters of Seth Wright, deceased, testate.

The bill alleges that the Hampshire bank, in Northampton, was incorporated by an act of the legislature passed in 1813, and that by the provisions of that act the charter was to expire, and did expire, on October 1, 1831; that Seth Wright, at the time of making his will, and until his decease,

Barrett v. Wright.

owned stock in the Hampshire bank to a greater amount than $14,000, and stock in the city bank, in Boston, to a greater amount than $2,000; that his will, made in March 1826, contained the following bequest — "1. I give and bequeath to my daughter Sarah Adams 7000 dollars in stock of the Hampshire bank, and 1000 dollars in stock in the city bank, in Boston, at the par nominal value thereof," — and a bequest, in similar terms, to the testator's daughter Mary, then unmarried; that the testator gave the greater part of his estate, real and personal, to his son, the defendant, and appointed him executor of the will; that about the 1st of August, 1826, Benjamin Barrett intermarried with the testator's daughter Mary, and that on the 2d of November ensuing the testator made a codicil, directing that the sum of 1600 dollars should be deducted from the bequest made in his will to his daughter Mary, and further directing "that the bank stock given my daughters Sarah and Mary shall stand in the name of my son Theodore until the expiration of the charter of the Hampshire bank, he my said son Theodore faithfully and punctually paying to his said sisters all dividends on such stock after my decease;" that the testator died in January, 1829, and that the defendant proved the will and took upon himself the trust of executor; that after this the bank stock bequeathed as above mentioned, was transferred to, and has ever since stood in the name of the defendant; and that after the 1st of October, 1831, the plaintiffs severally applied to the defendant to assign the bank stock to them, which he refused to do. The bill prays that the defendant may be compelled to assign the bank stock to the plaintiffs respectively, and in the proportions to which they are severally entitled.

The defendant, in his answer, alleges that the charter of the Hampshire bank did not necessarily expire on the 1st of October, 1831, and that by an act passed on February 28, 1831, it was extended to October 1, 1851, and that in all respects the business of the bank has been transacted since October 1, 1831, as it was before that time; that the testator intended that the stock should stand in the name of the defendant so long as the bank should continue its operations as a banking company, as well in case of an extension of its charter, as while acting under the sole authority of the act of 1813; that the testator, in conversations by him had with the defendant, as well as with other persons, both before and after the making of the codicil, and with reference thereto, declared his expectation and belief that the charter of the bank would be extended; and that the defendant refused to transfer the stock to the plaintiffs, as by law and a faithful discharge of the trust reposed in him by the testator, he felt himself bound to do.

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Sept. 24th.

Forbes, for the plaintiffs, said that the conversations referred to in the defendant's answer, were not admissible in evidence to affect the construction of the will; *Farrar* v. *Ayres*, 5 Pick. 404; 3 Stark. Ev. 1010; *Foster* v. *Wood*, 16 Mass. R. 116; *Richards* v. *Dutch*, 8 Mass. R. 506; *Hall* v. *Leonard*, 1 Pick. 31; and that the testator, when he made his will and codicil, had regard to the expiration of the then existing charter of the bank; (see, for rules of construing wills, *Richardson* v. *Noyes*, 2 Mass. R. 56; Doug. 494, note 1; *Bagshaw* v. *Spencer*, 1 Ves. sen. 153; *Jackson* v. *Billinger*, 18 Johns. R. 381; Bac. Abr. *Legacies*, *B* 3; *Poole* v. *Poole*, 3 Bos. & Pul. 627;) that this was a question as to the intention of the testator, but that even in point of law, the bank did not continue to act after October 1, 1831, by virtue of the original charter. *St.* 1828, *c.* 96, § 30, 31; *St.* 1830, *c.* 58, § 1.

Bates and *Dewey*, for the defendant, cited as to the admissibility of the testator's conversations, *Sargent* v. *Towne*, 10 Mass. R. 307; and they contended that the statutes of 1828 and 1830, above cited, had the effect to remove the limitation affixed to the charter of the bank, so that it did not expire in 1831.

Sept. 29th.

SHAW C. J. delivered the opinion of the Court. The only question for the Court, in the present case, is, what the testator intended by the clause in his will which has been the subject of comment. By the terms of the will, the legacy of bank stock to the daughters severally, was specific, and would have vested in them immediately. But by the provision in the codicil, the testator directed that the same bank stock should stand in the name of his

son Theodore, the defendant, until the expiration of the charter of the Hampshire bank, he paying to his sisters all dividends on such stock after the testator's decease. This in effect changed the bequest from a direct gift to his daughters, to a gift of the legal interest in the stock to his son, upon trust to pay over to them the income for a certain time, periodically, and then to transfer to them the principal. The question is, what period of time was thus intended. All the material facts alleged in the bill are admitted by the answer; the defendant admits that he has not transferred the stock, and feeling that he was bound to execute the trust reposed in him by his father, and believing that by the terms of the will, and in order to the execution of the trust, he was bound still to retain the stock in his own name, and on no other ground, he has refused to make the transfer.

We think the evidence offered in the answer, that is, proof by parol evidence, what the testator said and expected in regard to the renewal of the bank charter, is inadmissible. It would be to give an effect to clauses of a will, by parol evidence, different from that which the natural force and construction of the language would warrant, and so would tend to give effect to a parol will, contrary to the plain intent of the statute, requiring a will to be in writing, and when (as the present) it is a will of lands, as well as personalty, to be attested by three witnesses.

We do not think it necessary to consider how far a corporation has an intrinsic capacity to accept an act of the legislature, extending the terms of its duration, and whether, if so extended, it is legally or metaphysically the same or another corporation, or whether the act of renewal is an act creating a corporation, or only one protecting and continuing one already existing. The sole question is, what did the testator understand, and how did he mean to be understood, in the language thus used.

By the law as it then stood, the charter of the Hampshire bank would expire in October 1831. It is obvious too, that the transfer of stock in the City bank, was to depend upon the same event, that is, the expiration of the

charter of the Hampshire bank, though the charter of the City bank, of which the testator was an original stockholder, was to expire at the same time. Had he intended to make it depend upon the contingency of a renewal in fact, as one might be renewed and the other not, it seems highly probable that he would have provided for that contingency. But if he intended that the trust should determine at the time fixed by law for the expiration of the charter, then, as both were to expire at the same time, it was unnecessary to name both.

But the other, and perhaps the most important consideration, is this; it is manifest from the will and codicil taken together, that it was the intention of the testator, that the daughters should have the stock, after a limited time; but if he looked not to the time then limited by law for the expiration of the bank charter, but to such time as it might be extended to, by a new legislative act, it would be wholly indefinite. If it were to extend to a period subsequently to be fixed by a new act of the legislature, the same rule of construction would extend it from time to time, as long as the bank might be renewed by any successive acts. Considering that, as well from the general scope, as the particular provisions of the will, this was not the intent of the testator, we are of opinion, that the duration of this trust was intended to be coëxtensive with the duration of the bank charter as then fixed and limited by law, and that from and after that time it was the duty of the defendant, under this trust, to transfer the stock to his sisters.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

COMMONWEALTH OF MASSACHUSETTS.

VOL. IV.

CONTAINING THE CASES FOR THE YEAR 1808.

By DUDLEY ATKINS TYNG, Esq.
COUNSELLOR AT LAW.

WITH NOTES

AND

REFERENCES TO THE ENGLISH AND AMERICAN CASES

CHARLES C. LITTLE AND JAMES BROWN

may appear that he had no cause of action when he commenced his suit, his writ shall abate. (1)

Thus, where the *teste* of the original was before the day of payment in the condition of the bond, on which the action was brought, it was adjudged error, although after verdict. (2)

So in *assumpsit*, where it appeared by the declaration that the action was brought before the cause of action accrued. (3) And by Lord *Mansfield:* (4) No proof at the trial can make good a declaration which contains no ground of action on the face of it. By *Buller*, J.: (5) After verdict, nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated.

Williams contended that though this declaration must have been acknowledged bad on demurrer, yet that the verdict had cured it. The statute of 1782, *c.* 11, § 6, requiring demurrers to declarations to be filed before the jury is impannelled will be evaded, if advantage can be taken of such defects after verdict. The verdict shows that the facts must have taken place before that time, and this action must therefore be a good bar to another action for the same cause. The declaration alleges the request to have been made before the date of the writ, which is inconsistent with the time al-
[* 265] leged for the * promise; and the Court will reject the first, in order to support a verdict.

The cause stood continued *nisi*, and now the opinion of the Court was delivered by

PARSONS, C. J. Had this objection been made on special demurrer, the declaration must have been quashed; but the plaintiff insists that the fault, which was a mere slip of the pen, is cured by the verdict.

If we take the whole declaration together, it seems impossible that the defendant could doubt as to the specific nature of the complaint against him, or that the jury could have been misled. It is true that the promise is alleged to be made at a day to come; but the breach is alleged to be committed afterwards, on a day then past. We therefore feel a disposition to support this verdict, if it can be done without violating any correct principle.

It is not easy to reconcile all the cases on this subject; but the case of *Sorrel* vs. *Lewin*, reported in 1 *Keb.* 354, is in point. In that case, *indebitatus assumpsit* was brought, and the *assumpsit* laid on a day not then come. Infancy was pleaded in bar, to which the plaintiff replied that it was for necessaries; and on issue being joined, the verdict was for the plaintiff. Upon motion to arrest the judg-

(1) 5 *Gwil. Bac. Abr.* 332.
(2) *Cro. Eliz.* 325. *Moore*, 398.
(3) *Cro. Jac.* 574.
(4) *Doug.* 681.
(5) 1 *Term Rep.* 141.

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ment for this fault in the declaration, the court observed that there should have been a special demurrer, that it was well enough after verdict, which could not have been found for the plaintiff, but on evidence of a promise made before the action, and a duty before the promise. And the plaintiff had judgment. The principle of this case is very reasonable, and, as it is an authority in point, the plaintiff in the principal case must have judgment.

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* JOSEPH CLAP *versus* IRA DRAPER.

A grant to one, his heirs and assigns, of all the trees and timber standing and growing in a close forever, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber; and the grantee may maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees.

TRESPASS for breaking and entering the plaintiff's close in *Dorchester*, in the county of *Norfolk*, and cutting and carrying away five hundred trees of the value of five hundred dollars.

Upon not guilty pleaded, the cause was tried at *Dedham*, and a special verdict found, from which it appears that on the 18th of May, 1763, *Joseph Humfrey* was seised of the close in fee, and by a deed then executed conveyed the same to one *Stephen Fowler* in fee; that on the same day, *Fowler* reconveyed to *Humfrey*, his heirs and assigns, all the trees and timber standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber, at all times, at their pleasure forever; that the plaintiff holds all the right which was conveyed by *Fowler* to *Humfrey*, and the defendant holds all the estate that was *Fowler's*; that in the deed executed by *Fowler* no consideration is expressed; that the defendant cut and carried away the trees mentioned in the declaration, some of which were standing at the date of the deeds aforesaid; that from the said date to the present time, the plaintiff, and all those under whom he claims, have taken and carried away the trees at their pleasure; and that, during all that time, the defendant, and all those under whom he claims, have had the herbage. And if, upon the facts found, the Court should be of opinion that the defendant is guilty of the trespass charged, or of any part of it, the jury find him guilty accordingly, and assess the damages; otherwise they find him not guilty.

The question upon the plaintiff's right to recover upon this

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verdict was argued at the last September term at *Dedham*, by *L. Richardson* for the plaintiff, and *J. Richardson* for the defendant.

L. Richardson, to show that the plaintiff had an estate of inheritance in the timber and trees growing on the land, in virtue of the deeds produced at the trial, and that he was well entitled to this form of action, cited *Richard Lifford's case*, 11 *Co.* 49.—Sir *Francis Barrington's case*, 11 *Co.* 271.—*Ives's* [*267] *case*, 5 *Co.* 11.—3 *Dyer's Rep.* 285,—2 *Brownl.* 269, 322, 328.—*Bracton*, 222.—*Co. Lit.* 4.—*Rolle's Rep.* 96, 99, 127.

J. Richardson contended, 1. That the grant of the trees amounted only to a license, and cited 3 *East's Rep.* 115, *Spyve* vs. *Topham*. 2. That the grant was confined to the trees then growing, and did not extend to such as should afterwards spring up. *Whistler* vs. *Pasloe*, *Cro. Jac.* 487.—*Pincomb* vs. *Thomas*, *Cro. Jac.* 524. 3. That the plaintiff cannot have this action of trespass *quare clausum*, he not being owner of the close. The breaking the close being the principal or gist of this action of trespass, it lies only for the owner of the soil, and not for him who has a right to some accidental profits to be derived from it. If the plaintiff may maintain this action, it will follow that a stranger breaking this close will be subject to several actions, to be brought by the present plaintiff and defendant respectively.

The cause was continued *nisi* for advisement, and now, at this term, the opinion of the Court was delivered by

PARSONS, C. J. [After stating the action and reciting the substance of the special verdict.] The two deeds in this case, executed on the same day, the latter referring to the former, and relating to the same transaction, must be considered as intended to effect the same contract, and must be construed together. The result of this joint construction is, that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing, in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close *forever*, and not merely those then standing, or which should be standing within a limited time; and of a perpetual license to cut and carry them away. The plaintiff having all the estate in the trees, timber and close, which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees. 8 *Co.* 271.—*Cro. Jac.* 487.—2 *Roll. Abr.* 455, *l.* 20.—11 *Co.* 46.

For cutting down and carrying away the trees, tres- [*268] pass undoubtedly lies. 2 *Leon.* 213, *Hitchcock* vs. *Tarvey*.

But the defendant insisted that the plaintiff could not maintain trespass *for breaking the close*. Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close, as well as for cutting. It appears to be a principle of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit*; but not if his interest is in common with others. Thus this action lies for him who has the herbage, although not a right to the soil. *Moor.* 355, *Hoe* vs. *Taylor*.—*Co. Lit*, 4, *b*.—*Dalison*, 47.—*Moor.* 302.—*Cro. Eliz.* 421. But if he is entitled to a portion of the herbage for a particular part of the year, he cannot maintain this action, but may maintain an action of trespass for spoiling his grass. 2 *Leon.* 213. Vide also *Yelv.* 187, *Dewclas & Al.* vs. *Kendall & Al.*

The latest case on this subject is the case of *Wilson* vs. *Mackreth*, 3 *Burr.* 1824. The plaintiff had an exclusive right to take the turf in a several parcel of ground, in which, and in other parcels adjoining, he and the other tenants of the manor had common of pasture, the right of the soil being in the lord of the manor. The defendant dug and carried away peats in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. And the difference there taken is between exclusive rights and rights in common; that if the plaintiff had only a common of turbary, trespass would not lie.

Upon the authority of this case, as well as the reasonableness of the principle, the plaintiff, in consequence of his inheritance in the trees, had such an interest in, although not the right of soil, that he may maintain trespass *quare clausum fregit* in this case, and must have judgment on the special verdict.

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WILLIAM MONTAGUE *versus* THE INHABITANTS OF THE FIRST PARISH IN DEDHAM.

Persons assessed for the support of public worship in a parish, who have a right to have their moneys paid over to a minister other than the parish minister, must notify the parish of their desire to have their moneys so paid over, and the

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT OF JUDICATURE,

OF THE

STATE OF NEW-HAMPSHIRE.

FROM FEBRUARY TERM, IN THE COUNTY OF MERRIMACK, IN THE YEAR 1832, TO JULY TERM, IN THE COUNTY OF COOS, IN THE YEAR 1834, BOTH INCLUSIVE.

VOLUME VI.

PUBLISHED BY BENJAMIN B. FRENCH.

NEWPORT, N. H.

SIMON BROWN, PRINTER.

1835.

AMOS E. PUTNEY and others *versus* ISAAC DAY and others.

A sale of trees growing upon land, and to be taken by the purchaser within a certain time, is within the statute of frauds, and must be in writing.

A parol license, granted by the owner of land to another to take trees from the land as long as he to whom the license is granted, pleases, expires with the life of him who grants it.

THIS was an action of trespass, for breaking and entering the close of the plaintiffs in Warner, and cutting and carrying away only pine trees.

The cause was tried at February term, of the common pleas, 1833, and a verdict taken for the plaintiffs, subject to the opinion of this court, upon the following case.

On the 17th of May, 1815, Amos Putney and Henry Lyman, being the owners of the *locus in quo*, the said Lyman, leased to the said Putney, his half of the lot for the term of fourteen years.

On the 21st November, 1825, Amos Putney, by a written contract, in consideration of $112,50, sold all the pine timber on a certain part of the said lot to the Days, who, by the contract, were to have three years and four months to cut and haul the timber.

H. Lyman died on the 3d September, 1829, and his interest in the *locus in quo* descended to his daughter, who, on the 14th December, 1829, conveyed the same to one of the plaintiffs.

Amos Putney died in March, 1830, and the plaintiffs are his heirs.

On 1st March, 1832, the defendants entered and cut the trees mentioned in the declaration.

The defendants offered to prove, that in December, 1828, Amos Putney gave them, verbally, as long a time as they might choose to have to cut and carry away the timber, but this evidence was rejected by the judge who tried the cause.

Putney et al. v. Day et al.

S. Smith, for the plaintiffs.

Tappan, for the defendants.

RICHARDSON, C. J. delivered the opinion of the court.

The question is, whether a verbal license, given by Amos Putney to the defendants, in December, 1828, could avail them as a defence under the circumstances of this case. If it could, the verdict must be set aside and the evidence admitted. If it could not, the verdict is right, and the plaintiffs entitled to judgment.

The contract to sell the trees, in this case, was within the statute of frauds, and it was essential that it should be in writing. 1 Laws, 535; 2 Starkie's Ev. 598; 6 East, 602; 2 B. & P. 452; 2 Taunton, 38; 7 Johns. 205.

Under certain circumstances, a sale of a growing crop, or of timber, is not within the statute. 9 B. & C. 561; 5 ditto, 829, 11 East, 362; 2 M. & S. 204. But in this case the contract was clearly within the statute.

In *Pease* v. *Gibson*, 6 Greenleaf, 81, a sale of all the timber trees standing on a lot of land, the purchaser to have two years to take the timber, was held to be a sale only of the timber taken within the two years. And this decision seems to us to be reasonable. For otherwise, the purchaser might keep the timber encumbering the land as long as he pleased.

The license then given by Amos Putney, in December, 1828, was without any consideration to sustain it,

A license, which, in its nature, amounts to a grant of an interest in land must be in writing. 11 Mass. Rep. 533. But a parol license executed cannot be revoked. 8 East, 308. 4 Pickering, 368; 7 Bingham, 682.

And a parol license to be exercised upon land and granted upon a good consideration is valid, and cannot be revoked. 7 Taunton, 374.

Putney et al. v. Day et al.

But a license without consideration may be revoked. 1 Cowen, 243, and it is clear that the license given by Amos Putney, in December, 1828, expired with his life. 6 N. H. Rep. 11 ; 2 Mason, 244.

It is clear, then, that the evidence offered by the defendants was rightly rejected, and there must be

Judgment on the verdict.

S. P. Merriam et a. *versus* Rufus Wilkins and Erastus Wilkins.

A new promise made by an infant after coming of age, and after the commencement of the action, will not support the action.

Assumpsit for goods sold and delivered. The cause was tried in the common pleas, at September term, 1833, and a verdict taken for the plaintiffs, subject to the opinion of this court, on the following case.

The goods mentioned in the declaration were sold, and delivered to the defendants by the plaintiffs, but at the time of the sale Erastus Wilkins was an infant, under the age of twenty-one years. But to obviate the objection of his infancy the plaintiffs proved, that, after the commencement of this action, and after Erastus arrived at the age of twenty-one years, he declared that he would not take advantage of his infancy in the action.

Hutchins, for the plaintiffs.

Bartlett and *Peaslee*, for the defendants.

Richardson, C. J. delivered the opinion of the court.

We are of opinion that this action cannot be sustained against Erastus Wilkins. In *Wright* v. *Steele*, 2 N. H. Rep. 51, it was decided, that a promise made after the commencement of the action, and after the minor arrived at the age of twenty-one years, might be considered as a waiver of the defence of infancy so that the contract might be considered as valid from the beginning. But this view is sustained by no other authority, and cannot be reconciled with what must now be considered as settled principles of law on this subject.

Merriam et a. v. Wilkins et. a

It was supposed in that case that there was a close analogy between the case of a debt taken out of the statute of limitations by a new promise, and a contract of an infant ratified by a promise made after he comes of age ; and that this analogy was close enough to sustain that decision. But there is, in truth, no analogy between the two cases. In the case of the statute of limitations the new promise does not create a new cause of action, but shields an old one from the operation of the statute.

But in the case of infancy there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. 2 B. & C. 824, *Thornton* v. *Illingworth* ; 1 Pickering, 202, *Ford* v. *Phillips*.

The contract of an infant to pay for goods, sold and delivered to him, is, unless the goods are necessaries, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them, made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified.

In this case the plaintiffs may enter a *nolle prosequi* as to the infant, and take judgment on the verdict against the other defendant.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT OF JUDICATURE

OF

New-Hampshire.

VOLUME XII.

CONCORD:
PUBLISHED BY ASA McFARLAND.
1845.

GRIFFIN *vs.* BIXBY & a.

A committee appointed to set off dower, made a return, describing the southerly line of the tract set off as running from a certain monument, N. 82° E., to the east end of the lot. It appeared in evidence, that they in fact run out and marked a line varying in some parts from that course.—*Held*, that the actual location by monuments must control the course mentioned in the return.

A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other.

TRESPASS, for breaking and entering the plaintiff's close, in Litchfield, November 1, 1838, and on other days, &c.

Plea, the general issue.

Hugh Nahor, the former husband of Elizabeth Bixby, who is one of the defendants, was the owner of a farm in Litchfield. Upon his death, her dower in said farm was set off, April 12, 1815, by a committee appointed for that purpose. In the return of the committee, they described the southerly line of the tract set off, as running from "a pine tree marked, with stones at the root", north 82 degrees east, "to the east end of said lot." There are acknowledged monuments at each end of this line, but the return of the committee did not designate any intermediate monuments.

The defendants offered evidence, that at the time the dower was set off, the committee in fact surveyed and marked a line through a tract of wood-land, varying somewhat from a straight line, extending further south, and thus including the *locus in quo*; and that there has since been a cutting of wood, by the occupants, on both sides, up to this marked line.

The plaintiff derives title from the heirs of Nahor, to the land adjoining the dower, and he contended that this evidence could not be received to control the return of the committee.

There was evidence that a part of the distance between the corners was cleared, and a fence built, which varies from a straight line, but corresponds with the first monument found in the woods.

There was further evidence tending to show that one or more of the trees, alleged to have been marked, upon the line, as monuments, had been cut and carried away.

The questions arising upon the foregoing case were reserved for the consideration of this court.

Farley, for the plaintiff. The line between the parties, according to the assignment of the dower returned by the committee, is a straight line. The evidence offered is to show that the line was not straight. Parol evidence is not admissible for such a purpose. 8 *N. H. Rep.* 302, *Bartlett* vs. *Nottingham*; 4 *N. H. Rep.* 21, *Webster* vs. *Atkinson*; 3 *Stark. Ev.* 995; 1 *Stark.* 429; 6 *Mass. R.* 440, *Storer* vs. *Freeman*; 1 *Phil. Ev.* 410; 12 *Pick. R.* 563, *Wakefield* vs. *Stedman*; 16 *Pick.* 231, *Atwood* vs. *Cobb*; 22 *Pick.* 485, *Swan* vs. *Drury*; 21 *Pick.* 34, *Rice* vs. *Woods*; *Ditto* 503, *Driscoll* vs. *Fiske*.

Cutting a line tree, or a marked tree, is a trespass. Each owner must hold his part of the tree. Whenever a party cuts beyond the line he is liable. Should the tree bear fruit, each party must be entitled to what falls on his side.

If they owned as tenants in common, perhaps there might be a different form of action. But they cannot own as tenants in common, for they hold their lands in severalty.

J. U. Parker, for the defendants. The plaintiff's land is bounded by the dower, wherever that may be.

The line in dispute is north, 82 degrees east, to the east end of the lot. No monument is mentioned in the return at that place. If there had been a monument there, and no others along the line, it might have gone direct to that; but there are others, as much acknowledged as that. The committee run out a line, and marked it, and have misdescribed it. But the monuments must govern. 2 *Greenl. R.* 213, *Pike* vs. *Dyke*; 5 *Greenl.* 24, *Ripley* vs. *Berry*; 7 *Greenl.* 61, *Esmond* vs. *Tarbox*; 12 *Mass. R.* 469, *Makepeace* vs.

Bancroft; 3 *Fairf. R.* 320, *Call* vs. *Barker*; 7 *Johns. R.* 238, *Jackson* vs. *Ogden*.

If the marked line is not to govern, it will always be uncertain. The daily variation of the needle is more than the difference here.

There has been a quiet occupation, for many years, according to the line as marked.

As to cutting a tree on the line, we contend that trespass will not lie. The parties are tenants in common. 1 *Ld. Raym.* 737, *Waterman* vs. *Soper*; 3 *Stark. Ev.* 1457, n. q. This goes further than we contend.

If one tenant in common cuts trees, the other can have a remedy for his share.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor, the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line. 16 *Pick. R.* 235, *Allen* vs. *Kingsbury*. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return. 3 *Greenl. R.* 126, *Brown* vs. *Gay*; 5 *Greenl.* 24, *Ripley* vs. *Berry*; 7 *Greenl. R.* 61, *Esmond* vs. *Tarbox*; 13 *Maine R.* 329, *Thomas* vs. *Patten*; *ante* 20, 26, *Prescott* vs. *Hawkins*; *and see* 1 *U. S. Digest* 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and

acted with reference to that fact; which strengthens the case, and shows the propriety of the rule. 7 *Johns. R.* 241, *Jackson* vs. *Ogden*; 22 *Pick. R.* 410, *Clark* vs. *Munyan*.

As to the second question—In *Waterman* vs. *Soper*, 1 *Ld. Raym.* 737, cited for the defendants, Holt, C. J., ruled that if A. plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B., next adjoining, A. & B. are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in *Co. Litt.* 200, *b.*, it is said, "If two tenants in common be of land, and of mote stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt* vs. *Porter*, (8 *B. & C.* 257,) it was held, that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one—it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted, that for an entire destruction of the wall by one, trespass might have been sustained.

Without going to the extent of the ruling in Lord Raymond, we are of opinion that a tree standing directly upon

the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. *See cases cited in Odiorne* vs. *Lyford*, 9 *N. H. Rep.* 511.

French *vs.* Lovejoy & Trustee.

An assignment of partnership property, for the security and payment of the creditor of an individual partner, is invalid against the partnership creditors.

S. held a contract, upon which certain money was to be received for the benefit of L. & H., who were partners. L. & H. ordered the money, when received, to be paid over to A. L., to whom the partnership was indebted, and L., a surviving partner, after the death of H. made a formal assignment of the money to A. L., to be appropriated to the payment of his demands against the partnership. After this, S. received the money, at different times, and paid it over to A. L. The plaintiff in the mean time summoned S. and A. L. as trustees of L. & H.—*Held*, that A. L. was entitled to so much of the money as would satisfy his demands against the partnership, but that he was not entitled to retain for the private debt of L., the surviving partner, nor for the debts of other creditors of L. & H., to whom, without any authority, he had said that if there was any balance in his hands, he would pay the debts.—*Held*, also, that under these circumstances S. ought to be discharged, and A. L. charged as trustee.

Foreign Attachment. The action was founded upon a debt of Frederic Lovejoy and John Holt, who were formerly partners—Holt having deceased.

It appeared from the disclosure of George W. Senter, one of the trustees, that on the first of May, 1837, he made a contract with the post-office department, for the transportation of the mail from Nashua to Brattleborough, at the request of Lovejoy & Holt, who agreed to carry the mail according to the contract, and to save him harmless; and they entered upon the performance of the contract.

On the second of April, 1838, Lovejoy & Holt sold certain of their stage property to I. B. Crandall and others, and in payment thereof received from them a bond to carry the mail from Keene to Peterborough, at their own expense, until April 1, 1840. Crandall and others carried the mail according to their contract, Lovejoy & Holt being entitled to the compensation to be received from the post-office department therefor.

March 30, 1839, Lovejoy & Holt, having failed, assigned this bond to Abiel Lovejoy, and authorized him to enforce it for his own benefit, and they gave notice to Senter to pay whatever might be due them on the contract to him, it "being for value received," drawing an order on Senter for that purpose, which he declined to accept.

On the 28th of December, 1839, Holt having deceased, Frederic Lovejoy, as surviving partner, in consideration that the firm, and that he as surviving partner, were indebted to Abiel Lovejoy in sundry notes and sums of money, assigned to him all the claim and demand which he had against Senter on account of this contract, and for transporting the mail, and all interest in the contract, and authorized him to receive of Senter whatever money ought to be paid to him as surviving partner, in pursuance of the contract, to be appropriated in discharge of the notes and debts, so far as the same might go.

At different times between the 7th of May, 1839, and the 20th of May, 1840, Senter received sundry sums of money upon the contract, the proportion of which, for carrying the mail between Keene and Peterborough, amounted to $1040, which he paid over to Abiel Lovejoy, at different times, taking his receipt, and engagement to indemnify him. Part of the money thus paid over, amounting to $460, was received and paid after the service of the plaintiff's writ, which was served December 31, 1839.

Abiel Lovejoy, the other trustee, in his disclosure admitted the receipt of the money from Senter, on the order and as-

May Term, 1844.

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not think so. Notice to produce the original had been given. Its production was refused. Had it been voluntarily produced, there can be no doubt of its having been legal evidence against the defendant. It contained evidence that the defendant claimed and received, in addition to legal interest, exchange on the discount of notes, when not the slightest pretence for exchange existed. This certainly constituted usury. As the plaintiff could not produce the original, a sworn copy was the best secondary evidence of its contents. The plaintiff applied to a clerk of the bank for a copy of the discount book so far as his own dealings with the bank were concerned; he obtained what was delivered to him as a copy, and proved by the clerk who made it, that it was designed to be a copy, but that owing to his hurry he could not swear positively to its accuracy. As the defendant, having possession of the original, alone possessed the means of detecting any incorrectness in the copy, and failed to do it, we think the copy was sufficiently authenticated to go in evidence.

The defendant contends for the benefit of the plea of the statute of limitations, but in our opinion without reason. The agreement under which the cause was withdrawn from the jury, and submitted to the Court, was a waiver of that plea.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

Z. Baird and *R. C. Gregory*, for the plaintiff.

D. Mace, for the defendant.

GRONOUR v. DANIELS.

A declaration in trespass for cutting down and carrying away the plaintiff's trees is good, without an averment that the land where the trees were growing belonged to the plaintiff.

A license, in such case, cannot be given in evidence under the general issue, but must be specially pleaded.

If the Court charge the jury erroneously, but afterwards correct the mistake by giving a legal charge on the subject, there is no error.

Wednesday, May 29.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of

May Term, 1844.

Gronour v. Daniels.

ing to the plaintiff. Pleas, 1. Not guilty; 2. Tender of amends. There was also a third plea which was rightly adjudged bad on demurrer, and which the defendant admits cannot be sustained. Replication in denial of the second plea. That plea should also have been demurred to, as it is obviously inadmissible. Such plea in trespass owes its origin to the statute of 21 *James* the 1st, 6 Bac. Abr. 481, which is not in force here. Verdict and judgment for the plaintiff.

The defendant, in his brief, relies on three grounds to reverse the judgment. The first is, that the declaration is insufficient. The declaration is substantially as follows: For that the defendant, on, &c., at, &c., with force and arms, &c., cut down, prostrated, and destroyed the trees, to wit, twenty poplar trees, &c., of the said plaintiff, of great value, &c., then growing and being in and upon certain lands there situate, and took and carried away the same, &c. The declaration is objected to because the plaintiff's ownership of the land where the trees were standing is not shown; but the objection is not tenable. The suit being merely for cutting down and carrying away trees, it was only necessary to aver that the trees belonged to the plaintiff. The declaration agrees in form with the precedent in 2 Chitty's Plead. 869, and is unobjectionable.

The second objection to the judgment is, that the Court refused to permit the defendant to prove, under the general issue, that the trees were taken by the license of the plaintiff. To sustain this objection, the case of *Rasor* v. *Qualls*, 4 Blackf. 286, is relied on. That case decides, that, in trespass *quare clausum fregit*, the defendant may prove, under the general issue, that the freehold was in a third person, and that his entry was under the authority of the owner. There, the evidence was in denial of the declaration that the defendant had trespassed on the plaintiff's close, and it was therefore admissible under the plea of not guilty. But the case before us is very different. Here, the tendency of the evidence was not to show that the defendant had not cut down and carried away the plaintiff's trees, but to show that he was justified, by a license from the plaintiff, in committing the alleged trespass. Such a defence, it is well settled, must [illegible] 1 Chitt. Plead. 544.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT.

BY

WILLIAM G. SHAW.

VOL. 32.

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1861

The only case cited which seems to support the view, that there must be an actual disposal of the property in order to constitute the offence, is *Regina* v. *Brooks*, 8 C. & P. 295, 34 E. C. L., 396. That case is merely a *nisi prius* ruling of the late Ch. J. TINDAL, whose *nisi prius* opinion we concede to be entitled to as much weight as that of any single judge.

In that case the defendant hired a horse and gig in London, to go to Windsor to be gone two days. Instead of going to Windsor he went in the opposite direction to Rumford, where he offered the horse and gig for sale, but was unable to effect a sale because his appearance and manner excited so much suspicion, and upon such suspicion he was there taken into custody; Ch. J. TINDAL directed an acquittal. The only reason stated by the reporter is as follows: "Here has been no actual conversion of the property, only an offer to sell."

The case seems to be identical almost in its facts with Spencer's case, 1 Lew. 197, before BAYLEY, J. and Armstrong's case, 1 Lew. 195, before HOLROYD, J., in each of which it was submitted to the jury to say if the original design in obtaining the property was to steal it, and if so, it was held that it was larceny.

Mr. GREAVES, the English editor of the recent edition of Russell on Crimes, one of the most eminent of modern crown lawyers, treats the case of *Regina* v. *Brooks* as erroneous, and as conflicting with the other decisions in the English courts. We are unable to find that that case has been followed either in England or in this country. The reason given that there was no conversion of the property is unfounded, for the driving the horse and gig to another place was clearly a conversion. We feel justified in wholly disregarding the authority of that case, as opposed to both authority and reason.

The result of such a doctrine would be, that when property is thus obtained by a fraudulent device, the taker could never be convicted of larceny so long as he only kept the property for his own use, however effectually he might have deprived the owner of his property. The absurdity of the result is a sufficient answer to the proposition itself.

The exceptions are, therefore, overruled.

ALVIN HASKIN v. MERRITT RECORD.

Trespass.

The plaintiff, having the right to enter upon certain land belonging to another, upon which was standing both pine and cedar timber, which timber belonged to the plaintiff, sold to the defendant the pine timber and the right to enter upon the land to cut and carry it away. Both parties having entered upon the land to cut and carry away the timber belonging to them respectively, the defendant carried away some of the cedar felled by the plaintiff; *Held*, that the plaintiff could maintain trespass *quare clausum fregit* therefor.

TRESPASS in three counts, the two first *quare clausum fregit*, and the third *de bonis asportatis*. Plea the general issue, with notice of a license from the plaintiff to the defendant, to do the acts complained of. Trial by jury at the September Term, 1859,—ALDIS, J., presiding.

The plaintiff introduced in evidence a deed from Alexis White to Elijah Hungerford and Hollis Hastings, of the *locus in quo*, dated March 23, 1838. This deed conveyed to the grantees the land in question in order that they might take therefrom all the cedar, pine and tamarack timber growing thereon, and provided that when such timber should be removed, the land should revert to the grantor.

The plaintiff also introduced as evidence a contract between Hollis Hastings and himself, by which the former sold the latter all the tamarack, pine and cedar timber on the west half of the piece of land described in the deed from Alexis White to Hastings and Hungerford.

The plaintiff also gave evidence tending to show that he closed this contract with Hastings on the 19th of January, 1855, and that on the next day in the forenoon he entered on the land in question, and began to cut cedar timber, and that while so in possession of the premises the defendant entered thereon and cut and carried away the buts and tops of the cedar trees which the plaintiff had felled. It appeared that Hungerford and the plaintiff had divided between them the timber while standing, the former taking that on the east half and the latter that on the west half of the land.

The defendant gave in evidence a written contract between

the plaintiff and himself, dated January 19th 1855, by which the former acknowledged the receipt from the latter of seventy-five dollars in full for the pine timber upon the land in question, and agreed to return such money to the defendant if the plaintiff should not be able to close a trade with Hastings, giving him a good title to such pine timber.

The defendant's evidence also tended to show that afterwards on the same day the plaintiff, for a valuable consideration, verbally agreed to sell the defendant all the buts and tops of the cedar timber, then standing on the premises, and which the plaintiff was then expecting to buy of Hastings, with the condition to such verbal contract that it should be of no effect if the plaintiff should fail to buy such timber of Hastings; that the plaintiff closed his expected trade with Hastings on the evening of the 19th of January, and notified the defendant thereof on the next morning; that the pine and cedar timber were scattered indiscriminately over the whole premises; that very soon after the plaintiff had entered upon the premises and had begun to cut the cedar timber for the purpose of using the bodies of the trees, the defendant also entered thereon under his written and his verbal contracts above mentioned, for the purpose of cutting and taking away the pine timber under the former, and the cedar tops and buts under the latter; that in order to cut and draw away such pine and such cedar buts and tops, it was necessary for him to enter upon and occupy, for the time, such premises, and that for that purpose alone he did enter upon and occupy them.

The plaintiff then introduced evidence tending to prove that no such verbal contract, as the defendant claimed in regard to the cedar tops and buts, was made between the parties, but he admitted that he had sold the pine timber to the defendant, and that the latter entered upon the land for the purpose of cutting and carrying such pine timber.

It also appeared that at the time the defendant drew away the cedar tops and buts, he had entered upon the premises and was cutting off the pine under his written contract, and that the plaintiff at the same time was upon the premises cutting and drawing off the bodies of the cedar trees.

The defendant requested the court to charge the jury that the plaintiff could not maintain his action upon the two first counts, for breaking and entering the plaintiff's close. The court declined so to charge, but told the jury that although the defendant had the right to enter upon the premises and occupy the same for the purpose of cutting and drawing off the pine, and although at the time of the alleged trespass he was upon the premises engaged in cutting and drawing off the pine, still if they should find that there was no contract between the plaintiff and the defendant as to the cedar buts and tops, and that the defendant had no right to draw them off and that he did draw them off, then the plaintiff could recover for such cedar tops and buts, as well upon the two firs' counts as upon the third count.

The jury returned a general verdict for the plaintiff. To the refusal of the court to charge as requested, and to the charge as given, as above detailed, the defendant excepted.

J. J. Deavitt and *H. R. Beardsley*, for the defendant.

——— ———, for the plaintiff.

Pierpoint, J. The declaration in this case contains three counts; in the first two the plaintiff declares upon a trespass "*quare clausum*," and in the third, on a trespass "*de bonis*."

The court charged the jury that upon the facts as stated in the bill of exceptions, if found to be true, the plaintiff was entitled to recover on either of the counts.

The defendant insists that the charge was erroneous. He concedes that upon the facts found, the plaintiff was entitled to recover on the third count, but denies that trespass *qu. cl.* can be maintained, and that as the verdict is general, a new trial for that reason must be awarded.

In support of this position, it is claimed that the plaintiff and the defendant were the joint and common possessors of the premises on which the property in question was situated; that they were tenants in common of the possession, having a joint and equal right to enter upon each and every part of the premises on which the timber was situated, and that being such tenants in

common, an action of trespass *qu. cl.* cannot be maintained by the plaintiff for the injury complained of.

The general principle seems to be well settled, that one tenant in common cannot maintain trespass *qu. cl.* for an entry upon, or a mere injury to the common property; and if the relation existing between the plaintiff and the defendant at the time of the act complained of, was such as is contended for, the objection to the charge of the court would seem to be well taken.

But we think these parties cannot be regarded in any sense as tenants in common, or as having any joint interest or right in the realty or in the timber. The rights of each were entirely separate and distinct from those of the other. The plaintiff having the right to all the timber upon the premises except the pine, with the right to enter and remove it, and having entered for the purpose of removing it, is to be regarded as in the possession of the premises for all purposes, and to the extent, necessary to enable him to accomplish it and no further. Beyond this he has no interest in the premises and no right to the possession, but to this extent his right and his possession are exclusive, both as to the defendant and the owner of the soil, and if either were to enter upon the premises, and do any act in violation of these rights, the plaintiff would have his remedy by an action of trespass *qu. cl.* So, too, of the defendant, he is the owner of the pine timber with the right to enter and remove it. The case shows him to be in possession of the premises for the purpose of removing the pine at the same time that the plaintiff is in possession for the purpose of removing the other timber. Their possession is like their interest, not joint, but separate, and limited by the extent of their interest, and the possession of both does not constitute the entire possession, for except for the purpose of removing the timber the owner of the soil is to be regarded as in the possession, and for any injury to the freehold, not affecting the rights of the plaintiff or the defendant, in this suit, the owner of the soil could maintain the action of trespass *qu. cl.*

In this case, therefore, when the defendant, being in possession for the purpose of removing the pine timber, goes further and takes the cedar timber belonging to the plaintiff, and for the

removal of which he is in possession, as the exceptions show, such act of the defendant is not only a violation of the plaintiff's right of property, but is a violation of his possession; and this cannot be affected by the fact that the defendant has the right to go to all parts of the premises where the pine timber is to be found to remove it. As it is only to that extent that he is to be regarded as in possession, when he goes beyond this, as he must in all cases where he attempts to take the other timber, he becomes a trespasser on the possession of the plaintiff; he goes where he has no right to go, and where he has no possession, his possession being limited by his right.

We think the acts of the defendant were such that the plaintiff was entitled to his action of trespass *qu. cl.* therefor, and that there was no error in the charge of the court.

But if it was not so, it is not easy to see how the defendant could have sustained any injury thereby, it being conceded that the plaintiff, under the finding of the jury, was entitled to a verdict upon the third count, and as the plaintiff claimed to recover nothing but what he would have been entitled to recover under that count, it would seem that the verdict must have been the same if the charge had been in this respect as requested by the defendant, but under the view which we have already taken of the case, this consideration becomes unimportant.

The judgment of the county court is affirmed.

AZARIAH LAZELL *v.* GEORGE F. HOUGHTON.

Reference. Evidence.

An enlargement of a rule of reference, issued by a justice of the peace in conformity with the 63d sec., chap. XXIX., Comp. Stat., p. 237, cannot be made by the referee, but only by the justice himself with the consent of the parties; and unless the report of the referee is made pursuant to the rule of reference, as originally issued, or regularly enlarged, no judgment can be rendered on it.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ISAAC BLACKFORD, A. M.,

ONE OF THE JUDGES OF THE COURT.

VOL: VII.

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1847.

May Term, 1844.

GRONOUR v. DANIELS.

not think so. Notice to produce the original had been given. Its production was refused. Had it been voluntarily produced, there can be no doubt of its having been legal evidence against the defendant. It contained evidence that the defendant claimed and received, in addition to legal interest, exchange on the discount of notes, when not the slightest pretence for exchange existed. This certainly constituted usury. As the plaintiff could not produce the original, a sworn copy was the best secondary evidence of its contents. The plaintiff applied to a clerk of the bank for a copy of the discount book so far as his own dealings with the bank were concerned; he obtained what was delivered to him as a copy, and proved by the clerk who made it, that it was designed to be a copy, but that owing to his hurry he could not swear positively to its accuracy. As the defendant, having possession of the original, alone possessed the means of detecting any incorrectness in the copy, and failed to do it, we think the copy was sufficiently authenticated to go in evidence.

The defendant contends for the benefit of the plea of the statute of limitations, but in our opinion without reason. The agreement under which the cause was withdrawn from the jury, and submitted to the Court, was a waiver of that plea.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

Z. Baird and *R. C. Gregory*, for the plaintiff.

D. Mace, for the defendant.

GRONOUR *v.* DANIELS.

A declaration in trespass for cutting down and carrying away the plaintiff's trees is good, without an averment that the land where the trees were growing belonged to the plaintiff.

A license, in such case, cannot be given in evidence under the general issue, but must be specially pleaded.

If the Court charge the jury erroneously, but afterwards correct the mistake by giving a legal charge on the subject, there is no error.

Wednesday, May 29.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of trespass brought by *Daniels* for cutting and carrying away certain trees belonging to the plaintiff. Pleas, 1. Not guilty; 2. Tender of amends. There was also a third plea which was rightly adjudged bad on demurrer, and which the defendant admits cannot be sustained. Replication in denial of the second plea. That plea should also have been demurred to, as it is obviously inadmissible. Such plea in trespass owes its origin to the statute of 21 *James* the 1st, 6 Bac. Abr. 491, which is not in force here. Verdict and judgment for the plaintiff.

May Term, 1844.

GRONOUR v. DANIELS.

The defendant, in his brief, relies on three grounds to reverse the judgment. The first is, that the declaration is insufficient. The declaration is substantially as follows: For that the defendant, on, &c., at, &c., with force and arms, &c., cut down, prostrated, and destroyed the trees, to wit, twenty poplar trees, &c., of the said plaintiff, of great value, &c., then growing and being in and upon certain lands there situate, and took and carried away the same, &c. The declaration is objected to because the plaintiff's ownership of the land where the trees were standing is not shown; but the objection is not tenable. The suit being merely for cutting down and carrying away trees, it was only necessary to aver that the trees belonged to the plaintiff. The declaration agrees in form with the precedent in 2 Chitty's Plead. 869, and is unobjectionable.

The second objection to the judgment is, that the Court refused to permit the defendant to prove, under the general issue, that the trees were taken by the license of the plaintiff. To sustain this objection, the case of *Rasor* v. *Qualls*, 4 Blackf. 286, is relied on. That case decides, that, in trespass *quare clausum fregit*, the defendant may prove, under the general issue, that the freehold was in a third person, and that his entry was under the authority of the owner. There, the evidence was in denial of the declaration that the defendant had trespassed on the plaintiff's close, and it was therefore admissible under the plea of not guilty. But the case before us is very different. Here, the tendency of the evidence was not to show that the defendant had not cut down and carried away the plaintiff's trees, but to show that he was justified, by a license from the plaintiff, in committing the alleged trespass. Such a defence, it is well settled, must be specially pleaded. 1 Chitt. Plead. 544.

May Term, 1844.

Bennett v. Jones.

The last objection made to the judgment is, that the Court charged the jury that the plaintiff had a right to recover for the injury done to his land. It must be noticed, however, that the Court afterwards distinctly informed the jury, on the defendant's application, that the measure of damages was the value of the trees destroyed. We think, therefore, that the defendant cannot complain of this part of the case.

Per Curiam.—The judgment is affirmed, with 6 *per cent.* damages and costs.

W. H. Coombs and *R. Brackenridge*, for the plaintiff.

H. Cooper and *T. Johnson*, for the defendant.

BENNETT v. JONES and Another.

Scire facias to have execution in the Circuit Court on a justice's transcript. The writ alleged the recovery of a judgment by the plaintiff against the defendant before a justice of the peace for a certain sum, the issuing of a *fieri facias* on the judgment, and a return of the execution *nulla bona*. It stated, also, that the justice afterwards filed in the Circuit Court a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that Court. *Held*, that the averment that the transcript had been recorded was immaterial; that a plea, therefore, denying that the transcript had been filed *and recorded* was bad; and that the plea should have denied only so much of the averment as states that the transcript had been filed.

The defendant cannot, in such case, deny the truth of the constable's return of *nulla bona*.

If the transcript of the justice in such case states, that the writ in the suit was returned by the constable as served on the defendant, that statement is, at all events, *prima facie* evidence of the due service of the writ.

H. Lucas, May 29.

ERROR to the *Union* Circuit Court.

BLACKFORD, J.—*Scire facias* by *Jones* and another against *Bennett* to have execution, in the Circuit Court, against real estate on a justice's transcript.

The writ alleges the recovery of a judgment by the plaintiffs against the defendant before a justice of the peace for a certain sum, the issuing of a *fieri facias* on the judgment, and the return of the execution *nulla bona*. It states, also, that the justice afterwards filed, in the Circuit Court, a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that Court.

May Term, 1844.

Bennett v. Jones.

Pleas in bar as follows: 1. No such judgment as alleged; 2. No notice of the suit before the justice; 3. The justice's transcript was not filed and recorded in the Circuit Court; 4. No such transcript as alleged remains of record in the Circuit Court; 5. No execution was issued on the judgment; 6. No return of *nulla bona* to the execution; 7. The defendant had goods sufficient to satisfy the execution.

The third, fourth, and seventh pleas were demurred to, and the demurrers sustained. To the other pleas, replications were filed in affirmance of the allegations denied by those pleas. The cause was submitted to the Court, and judgment rendered for the plaintiffs.

We think the third plea is bad. The execution having been issued by the justice, and returned *nulla bona*, before the filing of the transcript, as shown by the *scire facias*, it was not necessary to have the transcript recorded. R. S. 1838, p. 375. *Hamilton* v. *Matlock*, 5 Blackf. 421. The averment in the *scire facias*, therefore, that the transcript had been recorded, was an immaterial averment, and the plea should not have noticed it. The traverse of the averment that the transcript had been filed and recorded is too large; it should have been only of so much of the averment as states that the transcript had been filed.

The fourth plea is in denial of an immaterial averment, and the demurrer to it was correctly sustained.

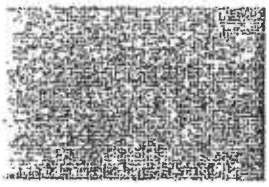
The seventh plea is also bad. We have heretofore held that, in a suit like this, the truth of the constable's return cannot be denied. *Hamilton* v. *Matlock*, *Supra*.

The judgment on the merits is objected to on the ground that the justice's judgment was by default, and that there is no sufficient evidence that the defendant had notice of the suit. The answer to this objection is, that the transcript of the justice given in evidence expressly states, that the writ was returned by the constable as served on the defendant. That statement must be considered, at all events, *prima facie* evidence of the due service of the writ.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

J. B. Sleeth, for the plaintiff.

J. S. Reid, for the defendants.



LEGISLATIVE
INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

DECLARATION OF FILOMENA M. YEROSHEK

I, Filomena M. Yeroshek, declare:

I am an attorney licensed to practice before the courts of the State of California, State Bar No. 125625, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Assembly Bill 514 of 1905. Assembly Bill 514 was approved by the Legislature and was enacted as Chapter 464 of the Statutes of 1905.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Assembly Bill 514 of 1905. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

ASSEMBLY BILL 514 OF 1905:

1. All versions of Assembly Bill 514 (Drew-1905);
2. Procedural history of Assembly Bill 514 from the 1905 Assembly Final History;
3. Excerpt regarding Assembly member A.M. Drew from the 1905 "Legislative Handbook";
4. Excerpt regarding Assembly Bill 514 from the Journal of Assembly, 1905;
5. Excerpt regarding former Civil Code section 3346a from Report of the Commissioners for the Revision and Reform of the Law, Revised Civil Code, 1898;

6. Excerpt regarding former Civil Code section 3346a from Report of the Commissioners for the Revision and Reform of the Law, Civil Code, 1900;
7. Excerpt regarding former Civil Code section 3346a from Report of the Commissioners for the Revision and Reform of the Law, Recommendations Respecting the Political Code, 1902;
8. Excerpt regarding former Civil Code section 3346a from Report of the Commissioners for the Revision and Reform of the Law, 1907;
9. Excerpt from the Index to the Laws of California, including the Code Commissioner's Notes for Sessions of 1905 and 1907, September 30, 1907;
10. Lewis v. Dunne (1901) from Reports of Cases: The Supreme Court of the State of California, Volume 134, 1902;
11. Article entitled, "The Revision and Codification of California Statutes, 1849-1953, by Ralph N. Kleps, Legislative Counsel for State of California;
12. Excerpt regarding former Civil Code section 3344 from the Political Code of the State of California, 1872;
13. Excerpt regarding former Civil Code section 3344 from the Political Code of the State of California, 1899;
14. Excerpt regarding former Civil Code section 3344 from the Political Code of the State of California, 1903;
15. All versions of Assembly Bill 683 (Committee on Revision and Reform-1901);
16. The Procedural History of the 1901 California Code of Civil Procedure as prepared by Legislative Intent Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 8th day of September, 2008 at Woodland, California.

Filomena M. Yeroshek

FILOMENA M. YEROSHEK

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ASSEMBLY BILL. **No. 514**

INTRODUCED BY MR. DREW,

JANUARY 18, 1905.

REFERRED TO COMMITTEE ON REVISION AND REFORM OF LAWS.

AN ACT

TO ADD A NEW SECTION TO THE CIVIL CODE, TO BE NUMBERED THIRTY-THREE HUNDRED AND FORTY-SIX *a*, RELATING TO DAMAGES FOR NEGLIGENTLY FIRING WOODS.

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Civil Code, to be numbered thirty-three hundred and forty-six *a*, and to read as follows:

3346*a*. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured.

LIS - 1a

SEC. 3. Section thirty-one hundred and ninety-seven of said code is hereby amended to read as follows:

3197. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value. Bills of exchange, promise to accept, effect of.

SEC. 4. Section thirty-two hundred and thirty-five of said code is hereby amended to read as follows:

3235. Damages are allowed under the last section upon bills drawn upon any person: Foreign bills of exchange, rate of damages.

1. If drawn upon a person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill;

2. If drawn upon a person out of this state, five dollars upon each one hundred dollars of the principal sum specified in the bill;

3. If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars of the principal sum specified in the bill.

CHAPTER CDLXIII.

An act to amend section thirty-two hundred and ninety-four of the Civil Code, relating to exemplary damages.

[Approved March 21, 1905.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Section thirty-two hundred and ninety-four of the Civil Code is hereby amended to read as follows:

3294. In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. Exemplary damages, in what cases allowed.

CHAPTER CDLXIV.

An act to add a new section to the Civil Code, to be numbered thirty-three hundred and forty-six a, relating to damages for negligently firing woods.

[Approved March 21, 1905.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Civil Code, to be numbered thirty-three hundred and forty-six *a*, and to read as follows:

3346*a*. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured. Damages for firing woods.

LIS - 1b

CALIFORNIA LEGISLATURE,

THIRTY-SIXTH SESSION.

ASSEMBLY FINAL HISTORY,

COMPILED UNDER THE DIRECTION OF

CLIO LLOYD, - - - - - - - Chief Clerk,

ASSISTED BY

J. STEPPACHER, Minute Clerk, and ED. J. SMITH, Assistant Clerk.

Session began January 2d and adjourned March 10th, 1905.
Length of Session, 68 days.

513—Drew, Jan. 18. To Com. on Rev. & Ref. of L.

An Act to amend Section 3294 of the Civil Code, relating to exemplary damages
Jan. 18—Read first time. To printer. Jan. 23—From printer. To committee.
Jan. 28—From committee, with recommendation do pass
Feb. 1—Read second time, ordered engrossed.
Feb. 3—Reported correctly engrossed.
Feb. 10—Read third time, passed, title approved. To Senate.
Feb. 13—In Senate: Read first time. To Com. on C. Rev.
Feb. 20—From committee, with recommendation do pass.
Feb. 21—Read second time. Feb 25—Read third time, passed, title approved.
Feb. 27—In Assembly: To enrollment.
Mar 4—Reported correctly enrolled.
Mar 21—Approved by Governor.

514—Drew, Jan. 18. To Com. on Rev. & Ref. of L.

An Act to add a new section to the Civil Code, to be numbered 3346a, relating to damages for negligently firing woods.
Jan 18—Read first time. To printer. Jan. 23—From printer. To committee.
Jan. 28—From committee, with recommendation do pass.
Feb. 1—Read second time, ordered engrossed.
Feb. 3—Reported correctly engrossed. Feb. 9—Passed on file.
Feb 10—Read third time, passed, title approved. To Senate.
Feb. 13—In Senate: Read first time To Com. on C. Rev.
Feb. 20—From committee, with recommendation do pass.
Feb. 21—Read second time. Feb. 25—Read third time, passed, title approved.
Feb 27—In Assembly: To enrollment.
Mar 4—Reported correctly enrolled
Mar 21—Approved by Governor.

515—Drew, Jan. 18. To Com. on Rev. & Ref. of L.

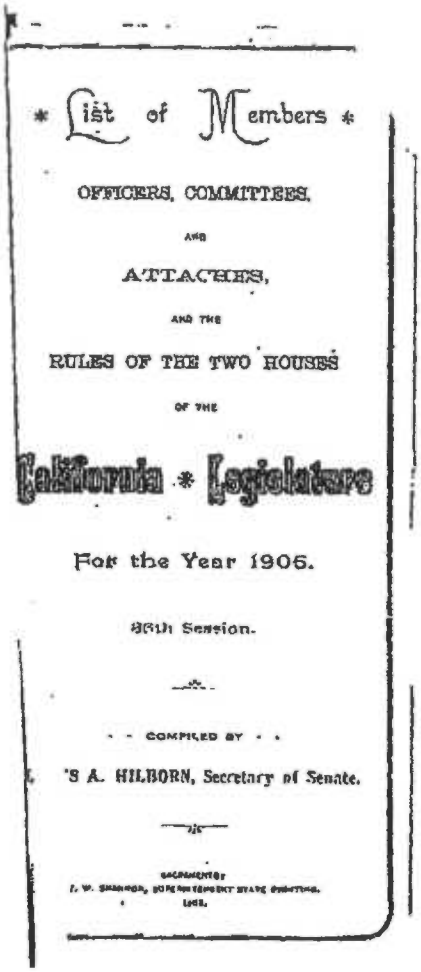
An Act to amend Section 3366 of the Civil Code, relating to specific and preventive relief.
Jan. 18—Read first time To printer. Jan. 23—From printer. To committee.
Jan. 28—From committee, with recommendation do pass
Feb. 1—Read second time, ordered engrossed.
Feb. 3—Reported correctly engrossed.
Feb. 10—Read third time, passed, title approved. To Senate.
Feb. 13—In Senate: Read first time. To Com. on C. Rev.
Feb. 20—From committee, with recommendation do pass.
Feb. 21—Read second time. Feb. 25—Read third time, passed, title approved.
Feb 27—In Assembly To enrollment.
Mar. 4—Reported correctly enrolled.
Mar. 21—Approved by Governor

516—Drew, Jan. 18. To Com. on Rev. & Ref. of L.

An Act to amend Section 3451 of the Civil Code, relating to assignments for the benefit of creditors.
Jan. 18—Read first time. To printer. Jan 23—From printer. To committee.
Jan. 28—From committee, with recommendation do pass.
Feb. 1—Read second time, ordered engrossed.
Feb. 3—Reported correctly engrossed.
Feb 10—Read third time, passed, title approved. To Senate.
Feb 13—In Senate: Read first time. To Com. on C. Rev.
Feb. 20—From committee, with recommendation do pass.
Feb. 21—Read second time. Feb. 25—Read third time, passed, title approved.
Feb. 27—In Assembly: To enrollment.
Mar 8—Reported correctly enrolled.
Mar 21—Approved by Governor.

517—Jones of Tuolumne, Jan. 18. To Com. on Jud.

An Act to amend an Act entitled "An Act to regulate the practice of pharmacy and sale of poisons in the State of California," approved March 15, 1901.
Jan. 18—Read first time. To printer. Jan. 23—From printer.
Jan. 24—To committee.
Mar. 9—From committee, without recommendation.
Mar. 10—Left on file.



* List of Members *

OFFICERS, COMMITTEES,

AND

ATTACHES,

AND THE

RULES OF THE TWO HOUSES

OF THE

California * Legislature

For the Year 1906.

36th Session.

COMPILED BY

J. A. HILBORN, Secretary of Senate.

SACRAMENTO:
J. W. SHANNON, SUPERINTENDENT STATE PRINTING.
1906.

List of Members of the Assembly—80 Assemblymen.

Hon. FRANK C. PRESCOTT, Speaker. Hon. THOS. E. ATKINSON, Speaker Pro Tem.

CLIO LLOYD, Chief Clerk.

District.	Counties.	Name.	Politics.	P. O. Address.	Sacramento Address.
		A			
77	Orange	Amerige, E. R.	R	Fullerton	Sutter Club
43	San Francisco	Anthony, Marc	R	123 Eddy St., S. F.	526 O St.
55	Santa Clara	Arnerich, Paul J. *	R	Los Gatos	1522 Q St.
39	San Francisco	Atkinson, Thos. E. *	R	713 Market St., S. F.	618 L St.
		B			
70	San Diego	Barnes, F. W. *	R	Pacific Beach	1309 H St.
47	Alameda	Bates, J. Clem*	R	2017 K. K. Ave., Al'm'da	1007 L St.
23	San Joaquin	Beardslee, R. J.*	R	Stockton, Box 18	731 O St.
38	San Francisco	Beckett, Samuel H.	R	1834 Gol'n Gate Av., S.F.	715 M St.
50	Alameda	Bliss, J. S.	R	Oakland	Golden Eagle Hotel
32	San Francisco	Boyle, Patrick J.	R	915 Illinois St., S. F.	916½ J St.
3	Humboldt	Braunstetter, L. F.	R	Ferndale	815 Tenth St.
25	Madera, Merced, Stanislaus	Burge, S. S *	R	Merced	Eighth and I Sts
49	Alameda	Burke, J. J.	R	822 Magnolia St., Okl'd	1125 Tenth St.
17	Sacramento	Busick, Chas. O.*	R	2600 J St., Sacramento	2600 J St.
		C			
60	Fresno	Chandler, W. F.	R	Selma	1200 O St.
54	Santa Cruz	Cleveland, George C. *	R	Watsonville	1227 K St.
41	San Francisco	Coghlan, Nathan C.*	R	2861 Octavia St., S. F.	801 Eighth St.
59	Monterey	Cooper, J. B. R.*	R	Monterey	1016 N St.
1	Del Norte, Trinity, Siskiyou	Coyle, J. L.*	R	Hoopa Valley	1806 M St.
4	Lass'n, Modoc, Shasta	Creighton, J. H.*	R	Redding	515 N St.

List of Members of the Assembly—Continued.

District.	Counties.	Name.	Politics.	P. O. Address.	Sacramento Address.
13	Sonoma	Cromwell, F. A.	R	Petaluma	Golden Eagle Hotel
29	San Francisco	Cullen, John A.	R	7 Ritch St., S. F.	417½ K St.
		D			
20	Solano	Devlin, Frank R.	R	906 Georgia St., Vallejo	Sutter Club
66	Kern	Dotsey, Jesse R.	R	Bakersfield	620 J St.
41	Fresno	Drew, A. M.	R	Fresno	1200 O St.
10	Placer	Duryea, Frank A.	R	Lincoln	621 M St.
		E			
22	Contra Costa	Ellis, Harry	R	Biege	1121 Twelfth St.
31	Alameda	Espey, R. H. R.	R	1303 Seventh Av., Oak'd	1321 Tenth St
78	Riverside	Estudillo, Miguel	R	Riverside	917 L St.
		G			
1	Tehama, Sierra, Plumas	Cross, H. S.	R	Red Bluff	1023 G St.
7	Butte	Gates, Dr. W. F.	R	109 Myers St., Oroville	Turelu Building
67	Los Angeles	Goodrich, John A.	R	Pasadena	823 M St.
		H			
40	San Francisco	Hartman, Gus	R	1345 Gough St., S. F.	Golden Eagle Hotel
16	Yolo	Hawkins, N. A.	D	Woodland	1200 O St.
6	Mendocino	Held, W. D. L.	R	Ukiah	1329 Tenth St.
74	Los Angeles	Houser, Frederick W.	R	709 Bryson Bldg, L. A.	823 M St.
		J			
56	Santa Clara	Jarvis, Ward M.	R	Santa Clara	State House Hotel
63	San Luis Obispo	John, Warren M.	R	San Luis Obispo	Turelu Building
80	San Diego	Johnson, Percy A.	R	Fallbrook	1321 L St.
68	Los Angeles	Johnstone, W. A.	R	San Dimas	1109 H St
26	Tuolumne, Mariposa	Jones, C. P.	D	Sonora	1023 Tenth St

LIST OF MEMBERS OF THE ASSEMBLY, WITH COMMITTEES OF WHICH EACH IS A MEMBER.

AMERICK, E. R.—Federal Relations (*Ch.*); Retrenchment and Reform; State Prisons and Reformatory Institutions; Irrigation; Commissions and Public Expenditures; Labor and Capital.

ANTHONY, MARC—Contingent Expenses and Accounts; Corporations; Election Laws; Military Affairs; Claims.

AUBERICH, PAUL—Public Morals; Roads and Highways; Public Buildings and Grounds; Agriculture; Fruit and Vine Interests.

ATKINSON, THOS. E.—Fish and Game; Swamp and Overflowed Lands; Oil Industries and Oil Mining Interests; Insurance and Insurance Laws; Commissions and Public Expenditures.

BARNES, F. W.—Public Buildings and Grounds (*Ch.*); Contingent Expenses and Accounts; Revenue and Taxation; Banks and Banking; Commerce and Navigation.

BATES, J. CLARK.—Insurance and Insurance Laws (*Ch.*); Public Works; State Capitol and Parks; Attachés and Employés; Banks and Banking; Public Charities and Corrections.

BEARDSLEE, R. L.—Municipal Corporations (*Ch.*); Constitutional Amendments; Revision and Reform of Laws; State Hospitals and Asylums; Judiciary.

BECKETT, SAMUEL H.—Mileage (*Ch.*); Commerce and Navigation; Manufactures and Internal Improvements; Public Works; State Capitol and Parks; State Prisons and Reformatory Institutions.

BLISS, JOHN A.—Attachés and Employés (*Ch.*); Banks and Banking; Reform of the Civil Service; State Prisons and Reformatory Institutions; Dairies and Dairy Products.

BOYLE, PATRICK J.—Manufactures and Internal Improvements; Public Printing; State Prisons and Reformatory Institutions; Fish and Game; Public Charities and Corrections.

BRANSTETTER, LOUIS P.—Commerce and Navigation; Fish and Game; Public Buildings and Grounds; Retrenchment and Reform; Dairies and Dairy Products; Agriculture.

BURGE, S. S.—Contingent Expenses and Accounts; Immigration; Irrigation; Mines and Mining Interests; County and Township Governments.

BURKE, JOHN J.—County and Township Governments (*Ch.*); Constitutional Amendments; Judiciary; Municipal Corporations; Public Morals.

BUSICK, CHAS. O.—Corporations; Levees and River Improvements; Ventilation and Acoustics; Ways and Means; Judiciary; County and Township Governments.

CHANDLER, W. F.—Building and Loan Associations; Fruit and Vine Interests; Irrigation; Oil Industries and Oil Mining Interests; Roads and Highways.

CLEVELAND, GEORGE C.—Fruit and Vine Interests (*Ch.*); Counties and County Boundaries; Judiciary; Oil Industries and Oil Mining Interests; Roads and Highways; Public Lands and Forestry.

COGHLAN, NATHAN C.—Public Charities and Corrections (*Ch.*); Election Laws; Federal Relations; Revision and Reform of Laws; Building and Loan Associations.

COOPER, J. U. R.—Dairies and Dairy Products (*Ch.*); Military Affairs; Public Buildings and Grounds; Public Lands and Forestry; Public Morals; Revenue and Taxation.

COYLE, JAMES L.—Roads and Highways (*Ch.*); Immigration; Military Affairs; Reform of the Civil Service; Mines and Mining Interests.

CREIGHTON, J. H.—Education; Fish and Game; Judiciary; Mileage; Mines and Mining Interests; Engrossment and Enrollment.

CROMWELL, F. A.—Contingent Expenses and Accounts (*Ch.*); Fruit and Vine Interests; Municipal Corporations; Rules and Regulations; State Hospitals and Asylums; Ways and Means.

CULLEN, JOHN A.—Irrigation (*Ch.*); Commerce and Navigation; Labor and Capital; Public Buildings and Grounds; Public Health and Quarantine; Swamp and Overflowed Lands and Drainage.

DEVLIN, FRANK R.—Engrossment and Enrollment (*Ch.*); Building and Loan Associations; Election Laws; Swamp and Overflowed Lands and Drainage; Ways and Means; Education.

DORSEY, JESSE E.—Oil Industries and Oil Mining Interests (*Ch.*); Claims; Judiciary; Mileage; Public Buildings and Grounds; Mines and Mining Interests.

DREW, A. M.—Revision and Reform of Laws (*Ch.*); Commissions and Public Expenditures; Fish and Game; Ways and Means; Military Affairs.

DURVEA, FRANK A.—Judiciary (*Ch.*); Mines and Mining Interests; Retrenchment and Reform; Contingent Expenses and Accounts; County and Township Governments.

ELLS, HARRY—Manufactures and Internal Improvements (*Ch.*); Fish and Game; Mines and Mining Interests; Oil Industries and Oil Mining Interests; State Prisons and Reformatory Institutions; Levees and River Improvements.

ESPEE, R. H. E.—Municipal Corporations; Revision and Reform of Laws; Public Health and Quarantine; Universities; Ways and Means; Judiciary; Revision and Reform of Laws.

ESTUDILLO, MIGUEL—Irrigation (*Ch.*); Constitutional Amendments; Education; Revision and Reform of Laws; Public Lands and Forestry.

GANS, H. S.—Military Affairs (*Ch.*); County and Township Governments; Public Lands and Forestry; Roads and Highways; State Library; Judiciary.

GATES, DR. W. F.—Public Health and Quarantine (*Ch.*); County and Township Governments; Public Printing; State Hospitals and Asylums; Ventilation and Acoustics.

GOODRICH, JOHN A.—Revenue and Taxation (*Ch.*); Revision and Reform of Laws; State Library; Universities; Ways and Means.

HARTMAN, GUS—Commerce and Navigation (*Ch.*); Engrossment and Enrollment; Manufactures and Internal Improvements; Municipal Corporations; Ventilation and Acoustics.

AB 514

CALIFORNIA LEGISLATURE—ASSEMBLY.

THIRTY-SIXTH SESSION.

IN ASSEMBLY.

ASSEMBLY CHAMBER, SACRAMENTO, CAL.,
Monday, January 2, 1905.

Pursuant to the requirements of the Constitution and the law, at the hour of twelve o'clock M., the Assembly of the thirty-sixth session of the Legislature of the State of California was called to order by Clio Lloyd, Chief Clerk of the Assembly, thirty-fifth session.

In conformity with law, the following officers of the thirty-fifth session were also present: A. A. Wood, Minute Clerk, and J. T. Stafford, Sergeant-at-Arms.

PRAYER.

By invitation of the Chief Clerk, the opening prayer was offered by Rev. Charles Van Norden, of Sacramento.

APPOINTMENTS.

The Chief Clerk appointed the following attachés, which were necessary to transact the business of temporary organization:

Postmistress—Mrs. Pauline Smith.
Assistant Sergeant-at-Arms—Ben Cohn, James Connell, and C. Cleaver.
Gatekeepers—Thomas F. Dolan, J. J. Wollers, and Thomas Tannian.
Pages—Walter Benohley, Donald J. Bruce, Harold Doherty, and F. J. Neidlein.
Speaker's Page—Willie Saunders.
Messenger to Printer—Neil Wells.
Assistants to Chief Clerk—Charles Thompson and J. P Greeley.
Assistant to Minute Clerk—E. Nolan.

The Chief Clerk directed that as the roll of counties was called the members-elect, representing such counties, should proceed to the Clerk's desk, present their certificates of election, take and subscribe to the constitutional oath of office, and return to their seats.

ROLL CALL OF COUNTIES.

As required by Section 239 of the Political Code, the Chief Clerk called the roll of counties in alphabetical order, and the following gentlemen appeared, presented their certificates of election, and were duly qualified by taking and subscribing to the following constitutional oath, administered by the Hon. E. C. Hart, of Sacramento County, Judge of the Superior Court:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and will faithfully discharge the duties of member of the Assembly of the thirty-sixth session of the California Legislature to the best of my ability.

ALAMEDA—E. K. Strobridge, Forty-sixth District; J. Clem Bates, Forty-seventh District; Philip M. Walsh, Forty-eighth District; John J. Burke, Forty-ninth District; John A. Bliss, Fiftieth District; R. H. E. Espoy, Fifty-first District; Wm. H. Waste, Fifty-second District.
ALPINE, AMADOR, CALAVERAS, MONO—C. H. McKenney, Eleventh District.
BUTTE—W. F. Gates, Seventh District.

RECESS.

At four o'clock and twenty-eight minutes P. M., on motion of Mr. Atkinson, a recess was declared until seven o'clock and thirty minutes P. M. this day.

EVENING SESSION.

The Assembly reconvened at seven o'clock and thirty minutes P. M. The Speaker, Hon. Frank C. Prescott, in the chair.

APPOINTMENT OF INVESTIGATION COMMITTEE.

The Speaker announced the appointment of the following-named gentlemen to constitute a committee on resolution to consider memorial against Superior Judge Lucas F. Smith, of Santa Cruz County:

Messrs. McCartney (chairman), Atkinson, Beardslee, Burke, and Lumley.

REPORT OF STANDING COMMITTEE—(OUT OF ORDER).

The following report of standing committee was received (out of order) and read:

ON REVISION AND REFORM OF LAWS

ASSEMBLY CHAMBER, SACRAMENTO, February 7, 1905

MR. SPEAKER: Your Committee on Revision and Reform of Laws, to whom was referred Assembly Bill No. 389—An Act to add a Chapter VI, of Title II, of Part II, of Division I of the Civil Code, relating to life, health, accident, and annuity or endowment insurance on the assessment plan—have had the same under consideration, and respectfully report the same back, and recommend that it do pass as amended.

DREW, Chairman.

Assembly Bill No. 389 ordered on second-reading file.

SPECIAL REPORT OF COMMITTEE ON REVISION AND REFORM OF LAWS, EXPLAINING CODE BILLS.

The Committee on Revision and Reform of Laws submitted the following special report, which was ordered printed in the Journal:

ASSEMBLY CHAMBER, SACRAMENTO, February 7, 1905.

MR. SPEAKER: Your Committee on Revision and Reform of Laws hereby makes a special report with reference to the Code revision bills now on the special file of said bills, and ready for third reading.

ASSEMBLY BILL No. 284.

(Last amended in Assembly February 1, 1905.)

Civil Code—Section 58: The provisions of this section are contained in the present Section 82. The section is therefore unnecessary.

Civil Code—Section 60: The change consists of the insertion of the word "Mongolians" after the word "negroes."

Civil Code—Section 63: The change consists in the substitution of the word "others" for "other" before "than"; the substitution of "a party" for "the parties" after "than"; and the substitution of "it" for "that marriage" after "invalidate." The meaning of the section is unchanged.

Civil Code—Section 79½: The change consists of the omission of the words "procuring a license and" after "to" in line 3, Section 4, Page 2, of the printed bill, thus requiring a license in every case, but leaving the mode of celebrating the marriage as at present. The section is renumbered 79a.

Civil Code—Section 84: The design of the amendment is to make the rule declared in this section applicable to all judgments adjudging marriage null, the present section applying only to cases where a marriage is annulled on *the ground that a former husband or wife was living*

ASSEMBLY BILL No. 265.

Civil Code—Sections 212, 243, 244, and 245: The provisions of the above sections, relating to guardian and ward, are controlled by Sections 1747, 1758, and 1793 of the Code of Civil Procedure. They are, therefore, unnecessary and misleading.

Civil Code—Section 246: The change consists in the addition of Subdivision 4, which is a codification of the Statutes of 1874–4, page 297, relating to the care of orphan and abandoned children. The penal provisions of that Act are, however, omitted as they do not properly find a place in this Code.

Civil Code—Section 247 The subjectmatter of this section is provided for in Section 1753 of the Code of Civil Procedure.

Civil Code—Sections 248 and 249 The provisions of these sections are included in Sections 1753 and 1770 of the Code of Civil Procedure.

Civil Code—Section 255 This section, which prescribed the mode of placing insane persons in the asylum, has been supplanted by later legislation (see Statute of 1897, page 311, relative to the establishment of a lunacy commission, and Political Code, Sections 2136 to 2199).

ASSEMBLY BILL No. 336

Civil Code—Sections 403 and 404 The bill adds a new chapter, entitled "General Provisions Affecting Corporations." Said chapter is made up of the old Section 403, which now stands in a chapter entitled "Extension and Dissolution of Corporations," and of the matter now in Section 384, which now stands in a chapter entitled "Examination of Corporations" The object of the rearrangement is the placing of the sections under a more appropriate chapter heading.

ASSEMBLY BILL No. 335

Civil Code—Section 399 This section, which purports merely to designate the place in the Code of Civil Procedure, where the dissolution of corporations is provided for, does not state any rule of law and constitutes but an imperfect index to the provisions referred to

Civil Code—Section 400 The change consists in the substitution of the word "a" for "such," in line 4.

Civil Code—Section 401 The design of the amendment is to require the written assent of stockholders representing two thirds of the capital stock, instead of permitting two thirds in number of the stockholders to act by their written consent. The change consists in the substitution of the words "two thirds of the members or of stockholders representing two thirds of the capital stock" in place of that number of "stockholders or members," in lines 11 and 12.

ASSEMBLY BILL No. 333.

Civil Code—Section 322 The change consists of the substitution of the language of the first sentance of Section 3, of Article XII, of the Constitution in place of the first sentence of the present section As the section now stands, it is believed to be unconstitutional. (See Larrabee vs. Baldwin, 35 Cal 155.) The words "an equal share" are substituted for "his proportion," in line 16.

Civil Code—Section 323 The change consists in the addition of the words "but any certificate issued prior to full payment must show on its face what amount has been paid thereon" (lines 7 to 9), the object being to require a certificate issued prior to full payment to show the amount paid thereon.

Civil Code—Section 325. The amendment is designed to make it clear that shares of stock standing in the name of a married woman are presumed to be her separate property, and that they may be dealt with by her as such, in the absence of proof and notice to the contrary.

ASSEMBLY BILL No. 332.

Civil Code—Sections 264 and 276· The bill is a codification of the Statute of 1875-6, page 842, relative to masters and apprentices, as amended in 1880, page 28, the old chapter being repealed and the provisions of the Acts above referred to substituted in place thereof.

In this codification Section 1 of the Statute has been made Section 264; Sections 2 and 7, 265; Sections 3, 4, 5, and 12, 266; Section 6, 267, Section 8 and the latter part of Section 9, 268; the first clause of Section 9 and all of Section 10, 269; Section 11, 270; Section 13, 271; Section 14, 272; Section 15, 273; Sections 16 and 17, 274; Section 19, 275; Section 20, 276.

It will be observed that Section 18 of the Statute has been omitted. It purports to make the parties to an indenture of apprenticeship liable to the master for any breach thereof.

The theory of the Statute is that the contract of apprenticeship is not made by the minor, but by his parent or guardian. If such parent or guardian is made personally liable on the contract, a parent will rarely, and the guardian almost never, enter into it. It seems sufficient that such parent or guardian be made answerable for the cost of the proceeding brought by the master to be released from the indenture, as provided for in Section 274. The master on his part is not absolutely bound, because he may, if he wishes to remove from the State, or to quit his trade or business, apply to be released from his contract, and he may take like action whenever the apprentice is guilty of neglect, refusal to do his duty, or gross misbehavior. These considerations seem to furnish good reason for the omission of the section

ASSEMBLY BILL No. 331.

Civil Code—Section 299 The change consists in the insertion of the words "other than the county in which its original articles of incorporation are filed " after "state," in line 4, Section 1.

Civil Code—Section 302 The change consists in the omission of the words "and the right to vote determined" after "given," in line 7, Section 2 The right to vote is controlled by Section 307.

Civil Code—Section 304 The provisions of the present section, declaring that no by law or any amendment thereof shall take effect until copied in the book of by-laws, is amended so as to permit by-laws and amendments thereof, which have been duly passed, to be treated as valid and enforcible against the corporation and persons having notice thereof, regardless of whether or not they have been copied into the proper book. It has often happened that by-laws have been published and generally acted upon by the corporation, and by others, and then their effect has been sought to be avoided on account of the failure of the proper officer to perform his duty of copying them as the Code directs. The change consists of the addition of the last sentence (lines 26 to 29)

Civil Code—Section 309 The change consists in the omission of the words "nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock," where those words first occur, and in the omission of the words "in the event of its dissolution," after "thereof," in line 5.

The reason for the omission of the words first above alluded to is that by some clerical error they occur twice in the section. The words "in the event of its dissolution," are omitted because their presence makes it impossible to enforce the liability against the directors unless the corporation is first dissolved, which could not have been the intention of the Legislature.

Civil Code—Section 310 The amendment, while it authorizes the removal of the whole board of directors by a two-thirds vote of the members or stockholders, denies the power to remove less than the whole number by such vote.

The reason for this is that by the system of cumulative voting sanctioned by Section 307, a minority may obtain representation in the board of directors; if so, a director elected to represent a minority of one third ought not to be removed by the subsequent vote of the other two thirds, and the system of cumulative voting and minority representation thus made ineffective. The first sentence only is changed.

Civil Code—Section 311 By the amendment proposed the holders of a majority of the stock, though their number is less than three, are authorized to apply to the justice to issue a warrant for an election. The change consists in the addition of the last sentence, lines 15 to 16.

Civil Code—Section 312 The change consists in the substitution of the words "Superior Court" in place of "District Court," in line 12, and in the omission of the words "bona fide" before "stockholder," in line 7. For the purposes of election, a person appearing upon the books of the corporation to be a stockholder should be permitted to vote, and election officers should not be vested with authority to deny such a stockholder the right to vote, or to claim that for some reason he is not a bona fide stockholder. (See Smith vs S. F. & N. P. Ry Co., 115 Cal 584.)

Civil Code—Section 314 The design of the amendment is to extend the provisions of the section to all elections howsoever authorized, and for this purpose the words "by law" are inserted after "appointed," "in" is omitted after "appointed," and "or otherwise" are inserted after "by-laws."

Civil Code—Section 315 The change consists in the substitution of the words "superior court of the county" for "district court of the district."

ASSEMBLY BILL No. 266.

Civil Code—Section 226 The first two sentences of this section have been recast with the design to making the proceeding for adoption judicial, thereby supporting it by the same intendments which are indulged in favor of other proceedings conducted in courts of record.

Civil Code—Section 227 The change consists in the substitution of the word "court" for the word "judge," in line 3, and in the addition of the last sentence, lines 8 to 10, said sentence being added for the purpose of making it clear that the papers constituting part of the adoption, or of the proceeding therefor, must be filed and preserved by the clerk.

ASSEMBLY BILL No. 390.

Civil Code—Section 465a This section is a codification of the Statute of 1893, page 208, relating to the operation of railroads.

Civil Code—Section 465 The amendment consists in codifying and adding to the section the provisions of the Act of 1880, page 43, to compel the operation of railroads, and of the Statute of 1897, page 6, to provide for the management and operation of railroads above certain elevations.

Civil Code—Section 473a Section 2 of the Statute of 1880, page 21, authorizing railway and other corporations organized under the laws of this State or of any State or Territory of the United States to do business in this State, on equal terms, is codified in this section

Civil Code—Section 481 The amendment consists in the substitution of the word "its" for "their" in line 3, and the substitution of "it" for "they" in line 5, thus correcting errors of grammar

Civil Code—Section 489 Section 11 of the Statute of 1880, page 47, defining the powers of the Board of Railroad Commissioners, is substituted in place of the present Section 489. The section has been inoperative since the adoption of the Constitution of 1879.

ASSEMBLY BILL No 388.

Civil Code—Sections 452a, 453b, and 453c. The Statute of 1875–6, page 889, concerning the powers of underwriters, as amended by the Statute of 1897, page 223, is codified in the sections above named, a new chapter being added, entitled "Corporations to Discover Fire, and to Save Property and Human Life From Destruction Thereby," to consist of Sections 453a, 453b, and 453c.

ASSEMBLY BILL No. 387.

(Last amended in Assembly February 1, 1905.)

Civil Code—Sections 452a and 453 The Statute of 1873–4, page 745, as amended by the Statutes of 1880, page 25, and 1901, page 6, relating to mutual benefit associations, is codified in the above sections, and a new chapter, entitled "Mutual Benefit and Life Associations," is added, to consist of Sections 452a and 453

ASSEMBLY BILL No. 386.

(Last amended in Assembly February 1, 1905.)

Civil Code—Sections 431 and 452 Section 431, which deals with the amounts to be received by life insurance companies, now stands in a chapter entitled "Fire, Marine, and Title Insurance Corporations." It is transferred to a more appropriate chapter, and numbered 452.

Civil Code—Section 448 This section exempts accident insurance companies from stamp duties, but as there are no such duties under the law as it now stands, the section is unnecessary.

ASSEMBLY BILL No. 385.

Civil Code—Section 428 The change consists of the insertion of the words "at once" before "reinsuring," in line 7.

ASSEMBLY BILL No. 384.

(Last amended in Assembly February 3, 1905.)

Civil Code—Section 414 The change consists of the insertion of the words "of any insurance company" after "incorporation," in line 4, thus making the section applicable, as was no doubt intended by the Legislature, to insurance corporations only.

Civil Code—Section 415 The change consists in omitting the clause in the last sentence of the section as it now stands, excusing the corporation from disposing of real property if it procures a certificate of an insurance commissioner that it will suffer by such sale, said clause being in conflict with that part of Section 9, of Article XII, of the Constitution which declares that no corporation shall "hold for a longer period than five years any real estate except such as may be necessary for carrying on its business."

Civil Code—Section 417 The change consists in the substitution of the word "its" for "their" before "by-laws," thus correcting an error in grammar.

Civil Code—Section 418 The change consists of the omission of the words "the estates of" before "all" in line 6.

ASSEMBLY BILL No. 498.

Civil Code—Section 1386 A clerical error is corrected by renumbering the subdivisions; certain grammatical errors are corrected. The words "or grandchild" are inserted after "child" in line 41; the words "nor the child or grandchild of a deceased brother or sister" are inserted after "sister" in line 44; the words "children of such deceased spouse and the descendants thereof, and if none, then to," are inserted in lines 76 and 74. In the second line of subdivision 8, the word "issue" is substituted for "kindred," and the subdivision amended in accordance with the urgent request of Judge Gray of the Supreme Court Commission to overcome such cases as estate of McCauley (138 Cal. 546).

Civil Code—Section 1368 The amendment consists in declaring that if an illegitimate child has been legitimated, his estate on his death is succeeded to as if he were born in wedlock

Civil Code—Section 1396 The change consists in the substitution of the words "other heir" for "other lineal descendants," in lines 4 and 7; the substitution of "heirs" for "issue" in line 6.

Civil Code—Section 1399 The change consists in the substitution of the words "other heir" for "other lineal descendant" before "receiving" in line 3, and in the substitution of "heirs" for "issue" after "leaving" in line 4.

Civil Code—Section 1406 The change consists in the words "superior court" for "district court" before "or" in line 4, and in the substitution of the words "he appears in the court in which such information was filed and asks for a judgment or order entitling him thereto," page 2, Assembly Bill No. 498 (lines 8 to 11), in place of the words "proof to the satisfaction of the State Comptroller and Treasurer be produced that he is entitled to succession thereto." The design of the amendment is to require the proof of the right to succession to be made in court instead of vesting the controller and the treasurer with power to determine the question.

Civil Code—Section 1408 This section is recast to conform to the proposed amendment to the last section.

Civil Code—Section 1409: This is a new section corresponding to the proposed Section 1314.

ASSEMBLY BILL No. 218.

Civil Code—Section 47. The change consists of the addition of the second sentence in subdivision 2 (lines 6 to 8). The purpose of the amendment is to render not privileged irrelevant matter maliciously published in the course of judicial proceedings

Civil Code—Section 49. The matter in subdivision 1 of the section as it now stands, referring to the abduction of a husband from his wife, and of a parent from his child, is omitted, and the words "of a husband from his wife" are inserted in subdivision 2. Also, the words "or of a servant from his master," now in subdivision 2, are omitted from the section.

Civil Code—Sections 51 and 52. The Statute of 1897, page 137, relating to the rights of persons, is codified in the two sections above named

Civil Code—Sections 53 and 54. The Statute of 1893, page 220, relating to the rights of persons, is codified in the sections above named

ASSEMBLY BILL No 393

Civil Code—Section 497. The change consists of the insertion of the words "compressed air" after "electricity" in line 19, and in the addition of the last sentence (lines 28 to 34), said sentence being a codification of the Statute of 1897, page 48, authorizing cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities and towns, and leading to parks owned by them.

Civil Code—Section 498: The change consists in the addition of the last sentence (lines 21 to 27), which is a codification of the Statute of 1893, page 44, requiring street railways to allow mail carriers to ride free of charge. The sentence which now follows the word "railways," in line 7, is transposed and placed in lines 17 to 20.

Civil Code—Section 504: The present Section 504 is recast, and the penalty is made $250 in place of $200.

Civil Code—Section 507 The amendment consists in the substitution of the word "municipality" for "corporation" in line 5, and of "owner of such railroad" for "corporation" in line 8.

ASSEMBLY BILL No. 394.

Civil Code—Section 513. The change consists in the omission of the words "they were" before the word "before" in line 14. The omission does not change the meaning of the section

Civil Code—Section 514. The change consists in the omission of that part of the section excepting from its operation the counties of Butte, Del Norte, Humboldt, Klamath, Plumas, and Sierra

Civil Code—Section 517 The section as it now stands authorizes the toll-gatherer to prevent from passing through his gate persons leading or driving animals or vehicles subject to toll. The form of the section has been changed to express what was doubtless originally intended by the Legislature.

Civil Code—Section 518. The change consists of the insertion of the words "or any vehicle or animal" after "passenger," in line 4

Civil Code—Section 522. The change consists in the substitution of the word "its" in place of "their" in line 5, thus correcting an error of grammar

ASSEMBLY BILL No. 395.

Civil Code—Section 524 The Statute of 1897, page 191, authorizing municipal corporations to construct paths and roads for the use of bicycles and other horseless vehicles, codified in this section.

ASSEMBLY BILL No. 396.

Civil Code—Section 528. The change consists of the insertion of the words, "or other governing body having authority in that behalf," after "supervisor," in line 5.

Civil Code—Section 529 The change consists of the insertion of the words, "or other governing body having authority in that behalf," after "supervisors," in line 6.

Civil Code—Section 530 The change consists of the insertion of the words, "or other governing body having authority in that behalf," after "supervisors," in line 5

ASSEMBLY BILL No. 399.

Civil Code—Section 583b This section is a codification of the Statutes of 1893, page 183, and 1897, page 27, the only change made being in the provisions concerning the person who is to make the report. The original Statute provided that the report should be made by the president or secretary. It has been thought best to impose the duty upon a single officer, so that it cannot be evaded by one officer by his saying that it was the duty of the other, or that he has supposed the other had, or would, perform it

ASSEMBLY BILL No. 478.

Civil Code—Sections 536, 537, and 537a. The bill revises the whole of Title XI, of part IV, of Division First, of the Civil Code, respecting mining corporations. Sections 536 and 537 are not changed, but simply reenacted. Section 537a contains substantially the matter now in Section 361, the word "corporations" being substituted for "companies" in lines 42, 53, 56, and 58, and the words "and to cause notice of the time and place fixed

for such meeting to be mailed to each stockholder of each of such corporations at his last known place of residence or business at least ten days before the time fixed for such meeting" being inserted (lines 60 to 64). The matter added is designed to provide the mode in which notices may be served on stockholders

Civil Code, Sections 533, 539, 590 The Statute of 1873–4, page 868, as amended in 1880, page 34, and 1897, page 38, is codified in the above sections, the only substantial change made being in the omission of the proviso in Section 1 of the amendatory Act of 1897, limiting its provisions to corporations "whose stock is listed and offered for sale at public exchange." The provisions of the part of the section omitted are unconstitutional. (See Johnston vs. Tautphaus, 127 Cal. 604.)

ASSEMBLY BILL No. 480.

Civil Code, Sections 591, 592, 592a, 592b, 592c, 592d, and 592e The bill adds a new title to the Code, designated "Corporations for the Formation of Chambers of Commerce, Boards of Trade, Mechanics' Institutions, and other Kindred Organizations," the matter contained in said chapter being a codification of the Statute of 1865–6, page 469, as amended in 1867–8, page 5, and 1885, page 76, respecting chambers of commerce.

ASSEMBLY BILL No. 481.

Civil Code—Sections 607, 607a, 607b, 607c, 607d, 607e, 607f, and 607g The subject-matter of the above sections is taken from the Statute of 1873–4, page 499; as amended in 1901, page 285, and 1903, page 69—to prevent cruelty to animals; the Statute of 1875–6, page 830, relating to the incorporation of societies for the prevention of cruelty to children; and the Statute of 1877–8, page 812, for the protection of children; and the Statute of 1877–8, page 813, relating to children. Section 1 of the Act of 1875–6, page 830, is codified in Section 607. Subdivision 7 of Section 2 of the same Act is codified in Section 607a, and Section 3 in Section 607b. Section 607c is a codification of Section 4 of the Act of 1875–6, page 830, and Section 4 of the Act of 1873–4, page 499. Section 5 of the Act of 1875–6, page 830, is codified in Section 607d, and Section 14 of that Act, as amended in 1903, page 69, and Section 5 of the Act of 1877–8, page 813, are consolidated and codified in Section 607e. Section 5 of the Act of 1873–4, page 499, as amended in 1901, page 285, is codified in Section 607f, and Section 3 of the Act of 1877–8, page 812, is codified in Section 607g, with the exception of subdivision 5 thereof, which is an addition thereto, to cover the matters referred to in the Act of 1877–8, page 813.

ASSEMBLY BILL No. 516.

Civil Code—Section 3451 The change consists of the insertion of the words "or creditors or to some other person or persons in trust for such particular creditor or creditors," after "creditor," in line 12. The rule stated in the section as amended by the addition of the clause above quoted is the rule heretofore enforced in this State (Lawrence vs. Neff, 41 Cal 566; Hendley vs. Pfister, 39 Cal 243; Priest vs. Brown, 100 Cal. 629); but some doubt has been thrown upon the subject by the later case of Sabachi vs. Chase, 103 Cal. 81.

ASSEMBLY BILL No. 515.

Civil Code—Section 3360 The change consists in the substitution of the words, "as provided by the laws of this State," in place of the words, "in the cases specified in this title and in no others" The purpose is to enlarge the scope of the section.

ASSEMBLY BILL No 514.

Civil Code—Section 3346a: The new section incorporates into this Code the principle now declared in Section 3344 of the Political Code

ASSEMBLY BILL No. 513.

Civil Code—Section 3294 The change consists in the substitution of the words "express or implied" for "actual or presumed," in line 5, and in the substitution of the words "the plaintiff, in addition to the actual damages, may recover," in place of the words "the jurors, in addition to actual damages, may give," in lines 5 and 6.

As the section now stands it appears to apply to jury trials only. This, of course, was not the intention of the Legislature.

ASSEMBLY BILL No. 512.

Civil Code—Section 3121 The change consists in the insertion of the words "or his agent" after "holder," in line 6. The design of the amendment is to conform the section in this respect to Section 3186.

Civil Code—Section 3176 The change consists in the insertion of the word "cannot" after "residence," in line 10, to correct a manifest error.

Civil Code—Section 3197 The change consists in the omission of the words "or other good consideration," as they occur after "value," line 6. The presence of these words implies that a consideration other than "for value" may support a promise in writing to accept a bill Such is not intended to be the law.

Civil Code—Section 3295: The change consists in the substitution of the word "a" for "any" before "person," in line 8; in the omission of the words "but in any of the

REPORT OF THE COMMISSIONERS

FOR THE

Revision and Reform of the Law.

Volume I.

REVISED CIVIL CODE.

NOVEMBER 30, 1898.

A. CAMINETTI, ROBT. N. BULLA, T. W. H. SHANAHAN,
Commissioners.

BART BURKE, - - - SECRETARY.

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1899.

OFFICE OF THE
COMMISSION FOR THE REVISION AND REFORM OF THE LAW,
SACRAMENTO, CAL., November 30, 1898.

To HON. L. H. BROWN, Secretary of State, *Sacramento, Cal.:*

DEAR SIR: Accompanying this preliminary report of the Commission for the Revision and Reform of the Law, please find the revised Civil Code of California, as considered and agreed upon by said Commissioners.

The remainder of the work accomplished by said Commissioners, consisting of the revised Political Code of California, and suggestions affecting the Penal Code and the Code of Civil Procedure, as well as recommendations for new legislation on various subjects and the disposition of existing statutes not embodied in either of the Codes, including a general report on all the subjects considered, is withheld, owing mainly to the limited clerical force at the disposition of the Commissioners, and will be filed during the coming month. The transcriptions and comparisons thereof are being made with such haste as is consistent with the importance of the subjects treated.

Respectfully submitted.

A. CAMINETTI, *Chairman,*
ROBT. N. BULLA,
T. W. H. SHANAHAN,
Commissioners for the Revision and Reform of the Law.

BART BURKE,
Secretary.

THE CIVIL CODE

OF THE

STATE OF CALIFORNIA.

An Act to Revise, Amend, and Re-enact an Act entitled "An Act to Establish a Civil Code," Approved March 21, 1872.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Title and divisions of this act.

SECTION 1. This act shall be known as "The Civil Code of California," and is in four divisions, as follows:

I. The first relating to persons.

II. The second to property.

III. The third to obligations.

IV. The fourth contains general provisions relating to the three preceding divisions.

COMMISSIONERS' NOTE: The words "of the state" are omitted from this section for the reason that they do not appear in the acts establishing the Code of Civil Procedure and the Penal Code, and their omission will render the titles to the several codes uniform.

PRELIMINARY PROVISIONS.

Rules applicable to.

SEC. 3255. A check is subject to all the provisions of this code concerning bills of exchange, except that:

1. The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby;

2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

CHAPTER V.

BANK NOTES.

Bank note negotiable after payment.

SEC. 3261. A bank note remains negotiable, even after it has been paid by the maker.

SEC. 3262. *Omitted.*

COMMISSIONERS' NOTE: By an act of March, 30, 1874 (Statu. 1873-74, p. —), section 3262 was repealed, and for that reason the same has been here omitted.

TITLE XVI.

GENERAL PROVISIONS.

Parties may waive provisions of code.

SEC. 3268. Except where it is otherwise declared, the provisions of the foregoing fifteen titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy.

DIVISION FOURTH.

PART I.

RELIEF.

TITLE I.

RELIEF IN GENERAL.

Species of relief.

SEC. 3274. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code.

Relief in case of forfeiture.

SEC. 3275. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

TITLE II.

COMPENSATORY RELIEF.

CHAPTER I.

DAMAGES IN GENERAL.

ARTICLE I.

GENERAL PRINCIPLES.

Person suffering detriment may recover damages.

SEC. 3281. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

Detriment defined.

SEC. 3282. Detriment is a loss or harm suffered in person or property.

Injuries resulting or probable after suit brought.

SEC. 3283. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.

ARTICLE II.

INTEREST AS DAMAGES.

Person entitled to recover damages may recover interest thereon.

SEC. 3287. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and

the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

In actions other than contract.

SEC. 3288. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.

Limit of rate by contract.

SEC. 3289. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

Acceptance of principal waives claim to interest.

SEC. 3290. Accepting payment of the whole principal, as such, waives all claim to interest.

ARTICLE III.

EXEMPLARY DAMAGES.

Exemplary damages, in what cases allowed.

SEC. 3294. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

CHAPTER II.

MEASURE OF DAMAGES.

ARTICLE I.

DAMAGES FOR BREACH OF CONTRACT.

expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Wrongful occupation of real property.

SEC. 3334. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 3335, 3344, and 3345 of this code, or section 1174 of the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

Willful holding over.

SEC. 3335. For willfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

Conversion of personal property

SEC. 3336. The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The value of the property at the time of the conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party;

2. A fair compensation for the time and money properly expended in pursuit of the property.

Same.

SEC. 3337. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent.

Damages of lienor.

SEC. 3338. One having a mere lien on personal property cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses.

Seduction.

SEC. 3339. The damages for seduction rest in the sound discretion of the jury.

Injuries to animals.

SEC. 3340. For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given.

Same.

SEC. 3341. The owner, possessor, or harborer of any dog, or other animal that shall kill, worry, or wound any horses, mules, neat cattle, swine, sheep, or angora or cashmere goats, shall be liable to the owner of the same for the damages and costs of suit, to be recovered before any court of competent jurisdiction.

1. In the prosecution of actions under this chapter, it shall not be necessary for the plaintiff to show that the owner, possessor or harborer of such dog or other animal had knowledge of the fact that such dog or other animal would kill or wound horses, mules, neat cattle, sheep, or goats.

2. Any person, on finding any dog or dogs not on the premises of its owner or possessor worrying, wounding, or killing any horses, mules, neat cattle, sheep, angora or cashmere goats, may at the time of so finding said dog or dogs, kill the same, and the owner or owners thereof shall sustain no action for damages against any person so killing such dog or dogs.

COMMISSIONERS' NOTE: If there is any necessity for the protection afforded to sheep and goats by this section a like necessity exists to extend same to horses, mules, neat cattle, and swine; hence the amendment proposed.

ARTICLE III.

PENAL DAMAGES.

Failure to quit, after notice.

SEC. 3344. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.

Tenant willfully holding over.

SEC. 3345. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one months' notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice.

Injuries to trees, etc.

SEC. 3346. For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

Liability for setting fire to woods; negligence.

SEC. 3346a. Every person setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured.

COMMISSIONERS' NOTE: This is section 3344 of the Political Code, which is transferred to its proper place in Civil Code, and remembered as section 3346a.

Injuries inflicted in a duel.

SEC. 3347. If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance, to be determined by the court.

SEC. 3348. *Omitted.*

COMMISSIONERS' NOTE: The commissioners recommend the repeal of this section, deeming it inexpedient and impolitic.

ARTICLE IV.

GENERAL PROVISIONS.

Value, how estimated in favor of seller.

SEC. 3353. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

Value, how estimated in favor of buyer.

SEC. 3354. In estimating damages, except as provided by sections 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.

Property of peculiar value.

SEC. 3355. Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer.

Value of thing in action.

SEC. 3356. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner.

Damages allowed in this chapter, exclusive of others.

SEC. 3357. The damages prescribed by this chapter are exclusive of the exemplary damages and interest, except where those are expressly mentioned.

Limitation of damages.

SEC. 3358. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages, and in sections 3319, 3339, and 3340.

Damages to be reasonable.

SEC. 3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to

REPORT

OF THE

Commissioners for the Revision and Reform of the Law.

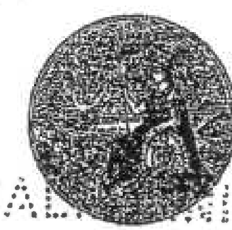
RECOMMENDATIONS RESPECTING THE

CIVIL CODE.

SEPTEMBER 1, 1900.

A. C. FREEMAN, W. C. VAN FLEET, GEORGE J. DENIS,
COMMISSIONERS.

W. F. HENNING, - - SECRETARY.



SACRAMENTO:
A. J. JOHNSTON, : : : : : SUPERINTENDENT STATE PRINTING.

x Re section 3346a

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REPORT OF THE COMMISSIONERS FOR THE REVISION AND REFORM OF THE LAW,

SUGGESTING AMENDMENTS TO, AND OTHER CHANGES IN, THE

CIVIL CODE.

The Commissioners for the Revision and Reform of the Law respectfully present this, their report, showing the amendments and other changes which, in their judgment, should be made in the Civil Code of the state. In their recommendations they have pursued the same plan disclosed in their report, heretofore presented, to the Code of Civil Procedure, and which, because of such disclosure, need not be here repeated.

In considering this code the Commissioners have had before them the printed report of their immediate predecessors in office, and have, in all cases, given it close attention, and have not only, in many instances, concurred in the substance of its recommendations, but in others have adopted the precise language employed. This adoption is referred to in some of the notes subjoined to the sections proposed for enactment or amendment, but this acknowledgment by no means measures our obligations to our predecessors, nor the extent to which we have availed ourselves of their work.

The labor of codifying those statutory provisions which are conceived to be so germane to the subject-matters of the Civil Code that they ought, beyond question, to be made a part of it, has been much greater than the corresponding codification required for the Code of Civil Procedure. On the other hand, the amendments and other changes proposed to that code involving questions of substantive legislation exceed in number, and probably in importance, those proposed to this. Chief among the changes hereinafter suggested are:

1. Making the law of accession to real property applicable to lands fronting upon all waters, instead of restricting it to rivers and streams,

found. If the drawee has no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for payment is excused, and the bill may be protested for nonpayment.

The word "cannot" inserted after "residence" to correct an error in the present section.

Section 3197. That section thirty-one hundred and ninety-seven read:

SECTION 3197. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value.

The words "or other good consideration" omitted at the end of the section, because they imply that a consideration other than "for value" may support a promise in writing to accept a bill, and such we do not understand to be the law.

Section 3235. That section thirty-two hundred and thirty-five read:

SECTION 3235. Damages are allowed under the last section upon bills drawn upon any person:

1. If drawn upon a person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill;

2. If drawn upon a person out of this state, five dollars upon each one hundred dollars of the principal sum specified in the bill;

3. If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars of the principal sum specified in the bill.

The section as it now stands divides, for the purposes of this section, that part of the United States not included within this state into two parts, namely, the states west and the states east of the Rocky Mountains, thus apparently ignoring the states now existing situated partly on each side of those mountains. We have, however, abolished the distinction altogether, and provided a uniform rate of damages for all the states irrespective of their position with reference to those mountains, and to that end have consolidated subdivisions two and three of the present section in subdivision two.

Section 3245. That section thirty-two hundred and forty-five read:

SECTION 3245. An instrument in the form of a bill of exchange, but appearing upon its face to be drawn upon and

accepted by the drawer himself, is to be deemed a promissory note.

Inserts "appearing on its face to be." Bills of exchange are not infrequently drawn by a person who is doing business under a business name upon himself under the business name, but drawn under his personal name. They should be treated as bills of exchange rather than as promissory notes.

Section 3294. That section thirty-two hundred and ninety-four read:

SECTION 3294. In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

The words "express or implied" substituted for "actual or presumed," and the words "the jury in addition to actual damages may give" stricken out and in place thereof substituted "the plaintiff, in addition to the actual damages, may recover." As the section now stands it appears to apply to jury trials only. This was never intended.

Section 3344. That section thirty-three hundred and forty-four read:

SECTION 3344. If any tenant gives notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.

The word "give" changed to "gives." The amendment corrects a supposed error of grammar.

Section 3346*a*. That a new section be added, to be numbered thirty-three hundred and forty-six *a*, to read:

SECTION 3346*a*. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured.

This amendment is to incorporate in this code the principle now asserted in section thirty-three hundred and forty-four of the Political Code.

Section 3366. That section thirty-three hundred and sixty-six read:

SECTION 3366. Specific or preventive relief may be given as provided by the laws of this state.

This section is formulated as recommended by our predecessors, and omits "in the cases specified in this title and in no others" and inserts in lieu thereof "as provided by the laws of this state," thus enlarging the scope of the section

assignment for the benefit of creditors, nor within the mischief intended to be remedied by the title on that subject. See also section thirty-four hundred and thirty-two.

Section 3479. That section thirty-four hundred and seventy-nine read:

SECTION 3479. Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

The word "which" inserted before "unlawfully."

Section 3503. That section thirty-five hundred and three read:

SECTION 3503. Where a private nuisance cannot be abated without entering upon the land of the wrongdoer, reasonable notice must be given to him before entering to abate it.

Omitting after "nuisance" the words "results from a mere omission of the wrongdoer, and." The remedy of abatement of a private nuisance is likely to give rise to serious difficulties and breaches of the peace unless carefully restricted, and the rule of this section should apply to nuisances by *commission* as well as to those by *omission*.

SACRAMENTO, September 1, 1900.

A. C. FREEMAN,
W. C. VAN FLEET,
GEORGE J. DENIS,
Commissioners for the Revision and Reform of the Law.

REPORT

OF THE

Commissioners for the Revision and Reform of the Law.

RECOMMENDATIONS RESPECTING THE

POLITICAL CODE.

ALSO

An Index to the Laws from 1895 to 1901, inclusive, and a List Indicating the Statutes Remaining in Force.

NOVEMBER 1, 1902.

PART II.

COMMISSIONERS:

A. C. FREEMAN, W. C. VAN FLEET, GEORGE J. DENIS.

W. F. HENNING, - - Secretary.

SACRAMENTO:

W. W. SHANNON, : : : : : SUPERINTENDENT STATE PRINTING.

1903.

PART II.

Index to the Laws, 1895 to 1901, inclusive.

Sections of the Codes Added, Amended, or Repealed.

List Indicating the Statutes Remaining in Force.

INDEX TO THE LAWS,

1895-1901, INCLUSIVE.

NOTE.—The use of the star indicates that the amendment was contained in the Code Commissioners' bills, one of which was declared unconstitutional in *Lewis v. Dunne*, 134 Cal. 291.

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3245		1901: 421	
3294		1901: 421	
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3366		1901: 421	
3396	1901: 421		
3402		1901: 422	
3406		1901: 422	
3412		1901: 422	
3440		1886: 47	
3442		1895: 154	
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3463		1895: 84	
3479		1901: 422	
3503		1901: 423	

CODE OF CIVIL PROCEDURE.

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X re Section 3346a

REPORT

OF THE

Commissioner for the Revision and Reform of the Law.

An Index to the Laws from 1895 to 1906, inclusive; a List of Sections of the Codes added, amended, or repealed from 1895 to 1906, inclusive; and a List indicating the Statutes Remaining in Force.

JANUARY 2, 1907.

Commissioner, - - - JOHN F. DAVIS.

SACRAMENTO

W. W. SHANNON, - - - SUPERINTENDENT STATE PRINTING

1906

EXPLANATIONS.

The following abbreviations are used:

C. C. = Civil Code.
C. C. P. = Code of Civil Procedure.
Pen. C. = Penal Code.
Pol. C. = Political Code.

The figures preceding and those following the colon refer respectively to year and page of the statutes.

The use of the star indicates an amendment which is subject to the constitutional objections sustained in *Lewis* vs. *Dunne*, 134 Cal. 291.

INDEX TO THE LAWS OF CALIFORNIA,

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TO THE

LAWS OF CALIFORNIA

1850-1907

INCLUDING THE STATUTES, THE CODES, AND THE CONSTITUTION OF 1879, TOGETHER WITH AMENDMENTS THERETO

ALSO

A LIST OF SECTIONS OF THE CODES ADDED, AMENDED OR REPEALED SINCE THEIR ADOPTION; A LIST OF STATUTES REPEALED BY THE CODES; A LIST OF THE STATUTES REMAINING IN FORCE; AND CODE COMMISSIONER'S NOTES, SESSIONS OF 1905 AND 1907

Prepared in accordance with Acts of the Legislature approved March 15, 1907, and March 18, 1907, under the supervision of

JOHN F. DAVIS

Commissioner for the Revision and Reform of the Law

W. H. ORRICK, Sec'y

SEPTEMBER 30, 1907

SACRAMENTO:

W. W. SHANNON, : : : SUPERINTENDENT OF STATE PRINTING

EXPLANATIONS.

The following abbreviations are used:

Const. =Constitution.
C. C. =Civil Code.
C. C. P.=Code of Civil Procedure.
Pen. C.=Penal Code.
Pol. C.=Political Code.

The figures preceding and those following the colon refer respectively to year and page of statutes.

The unconstitutional code amendments of 1901 (1901:117-205, 382-433, 433-513) are omitted from the following index, but are included in the list of sections of the codes added, amended, or repealed.

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NOTES ON CERTAIN AMENDMENTS TO THE CODES, 1905 AND 1907.

The following notes refer to the sections of the Codes, amended, revised, added, or repealed by the Legislature at the sessions of 1905 and 1907, as recommended by Hon. John F. Davis, during his term as Commissioner for the Revision and Reform of the Law, and have been revised by him from notes made at the time of the consideration of the legislation by the committees and sub-committees of the Senate and Assembly having it in charge:

CIVIL CODE.

SECTION,

7. Merely adds the Saturday half-holiday to the section so as to make it conform to section 10 of the Political Code adopted in 1905, and to section 10 of the Code of Civil Procedure, as amended in 1907.

51, 52. The statute of 1897, page 137, relating to the rights of persons, is codified in the two sections above named.

53, 54. The statute of 1893, page 220, relating to the rights of persons, is codified in the sections above named.

58. The provisions of this section are contained in the present section 82. The section is therefore unnecessary, and is, therefore, repealed.

60. The change consists in the insertion of the word "mongolinus" after the word "negroes."

68. The change consists in the substitution of the word "others" for "other" before "than"; the substitution of "a party" for "the parties" after "than"; and the substitution of "it" for "that marriage" after "invalidate." The meaning of the section is unchanged.

79*a* (79¼). The change consists in the omission of the words "procuring a license and" after "to," thus requiring a license in every case, but leaving the mode of celebrating the marriage as at present. The section is renumbered 79*a*.

84. The design of the amendment is to make the rule declared in this section applicable to all judgments adjudging marriage null, the present section applying only to cases where a marriage is annulled *on the ground that a former husband or wife was living.*

220. The first two sentences of this section have been recast with the design of making the proceedings for adoption judicial, thereby supporting it by the same intendments which are indulged in favor of other proceedings conducted in courts of record.

227. The change consists in the substitution of the word "court" for the word "judge," and in the addition of the last sentence, said sentence being added for the purpose of making it clear that the papers constituting part of the adoption, or of the proceeding therefor, must be filed and preserved by the clerk.

242, 243, 244, 245. The provisions of the above sections, relating to guardian and ward, are controlled by sections 1747, 1758, and 1793 of the Code of Civil Procedure. They are, therefore, unnecessary and misleading, and are, therefore, repealed.

246. The change consists in the addition of subdivision 4, which is a codification of the statute of 1873-4, page 297, relating to the care of orphan and abandoned children. The penal provisions of that act are, however, omitted, as they do not properly find a place in this Code.

247. The subject-matter of this section is provided for in section 1753 of the Code of Civil Procedure, and the section is, therefore, repealed.

248, 249. The provisions of these sections are included in sections 1753 and 1770 of the Code of Civil Procedure.

258. This section, which prescribed the mode of placing insane persons in the asylum, has been supplanted by later legislation (see statute of 1897, page 311, relative to the establishment of a lunacy commission, and Politi-

CIVIL CODE—Continued.

SECTION.

264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276. These sections codify the statute of 1875-6, page 842, relative to masters and apprentices, as amended in 1880, page 28, the old chapter being repealed and the provisions of the acts above referred to substituted in place thereof. In this codification section 1 of the statute has been made section 264; sections 2 and 7, 265; sections 3, 4, 5, and 12, 266; section 6, 267; section 8 and the latter part of section 9, 268; the first clause of section 9, and all of section 10, 269; section 11, 270; section 13, 271; section 14, 272; section 15, 273; sections 16 and 17, 274; section 19, 275; section 20, 276. It will be observed that section 18 of the statute has been omitted. It purports to make the parties to an indenture of apprenticeship liable to the master for any breach thereof. The theory of the statute is that the contract of apprenticeship is not made by the minor, but by his parent or guardian. If such parent or guardian is made personally liable on the contract, a parent will rarely, and the guardian almost never, enter into it. It seems sufficient that such parent or guardian be made answerable for the cost of the proceeding brought by the master to be released from the indenture, as provided for in section 274. The master on his part is not absolutely bound, because he may, if he wishes to remove from the state, or to quit his trade or business, apply to be released from his contract, and in any like action whenever the apprentice is guilty of neglect, refusal to do his duty, or gross misbehavior. These considerations seem to furnish good reason for the omission of the section.

290. The change consists in the addition of all after the first sentence in subdivision 6, providing for the classification of the capital stock into preferred and common stock.

290a. A new section providing an effective method of enforcing section 25 of the Bank Commission Act of March 24, 1903, added by the amendment of 1905 (Stats. 1905, p. 307).

299. The change consists in the insertion of the words "other than the county in which its original articles of incorporation are filed" after "state."

302. The change consists in the omission of the words "and the right to vote determined" after "given." The right to vote is controlled by section 307.

304. The provisions of the section, declaring that no by-law or any amendment thereof shall take effect until copied in the book of by-laws, are amended so as to permit by-laws and amendments thereof, which have been duly passed, to be treated as valid and enforcible against the corporation and persons having notice thereof, regardless of whether or not they have been copied into the proper book. It has often happened that by-laws have been published and generally acted upon by the corporation, and by others, and thereafter their effect has been sought to be avoided on account of the failure of the proper officer to perform his duty of copying them as the Code directs. The change consists in the addition of the last sentence.

309. The change consists in the omission of the words "nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock," where those words first occur, and in the omission of the words "in the event of its dissolution," after "thereof." The reason for the omission of the words first above alluded to is that by some clerical error they occur twice in the section. The words "in the event of its dissolution" are omitted because their presence makes it impossible to enforce the liability against the directors unless the corporation is first dissolved, which could not have been the intention of the legislature.

310. The amendment, while it authorizes the removal of the whole board of directors by a two-thirds vote of the members or stockholders, denies the power to remove less than the whole number by such vote. The reason for this is that by the system of cumulative voting sanctioned by section 307, a minority may obtain representation in the board of directors; if so, a director elected to represent a minority of one third ought not to be removed by the subsequent vote of the other two thirds, and the system of cumulative voting and minority representation thus made ineffective. The first sentence only is changed.

311. By the amendment proposed the holders of a majority of the stock, though their number is less than three, are authorized to apply to the justice to issue a warrant for an election. The change consists in the addition of the last sentence.

312. The change in the amendment of this section, as approved March 21, 1905, consisted in the substitution of the words "superior court" in place of "district court," and in the omission of the words "bona fide" before "stockholder." For the purpose of election, a person appearing upon the books of the corporation to be a stockholder should be permitted to vote,

CIVIL CODE—Continued.

SECTION.

a bona fide stockholder. (See Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584.) On March 22, 1905, another act (not suggested by the Commissioner) was approved, superseding the act approved upon the day before. This act omitted some of the changes of the act of March 21, but made other changes. In the session of 1907, the section as approved March 21, 1905, was repealed, but the changes contained in it were incorporated into the amendment of the section, as approved March 22, 1905.

314. The design of the amendment is to extend the provisions of the section to all elections howsoever authorized, and for this purpose the words "by law" are inserted after "appointed," "in" is omitted after "appointed," and "or otherwise" are inserted after "by-laws."

315. The change consists in the substitution of the words "superior court of the county" for "district court of the district."

322. The change consists in the substitution of the language of the first sentence of section 3 of Article XII of the Constitution in place of the first sentence of the section. Without such change it is believed the section would be unconstitutional. (See Larrabee v. Baldwin, 35 Cal. 155.) The words "an equal share" are substituted for "his proportion."

323. The change in 1905 consisted in the addition of the words "but any certificate issued prior to full payment must show on its face what amount has been paid thereon," the object being to require a certificate issued prior to full payment to show the amount paid thereon. The change in 1907 consisted in the addition of the last two sentences, to cover cases of the issuance of preferred and common stock.

325. The amendment is designed to make it clear that shares of stock standing in the name of a married woman are presumed to be her separate property, and that they may be dealt with by her as such, in the absence of proof and notice to the contrary.

359. The change consists in the addition of the "provided, however," clause in subdivision first, to cover cases of corporations issuing preferred and common stock.

360. Section 309, approved March 5, 1909, is added to section 360, to the end that there shall no longer be two sections numbered 360.

361. Repealed, and the matter therein added to section 587a.

363. There were formerly two sections of this number. Section 363, as adopted March 5, 1880, is repealed and its provisions amalgamated with section 360. This leaves in force the other section 363, which was adopted March 10, 1880.

384. As a result of the oversight in not repealing section 384 at the time section 404 was added in 1905, there were two sections in the Civil Code containing identical language, one being 384, and the other 404; 384 was not in the proper place, and 404 was. Section 384 was therefore repealed in 1907, leaving section 404 intact, and a proviso was added in the repealing act so that any rights acquired under 384 should not be lost, but continued in force under the provisions of section 404.

388. This section as it stood prior to the amendment applied only to corporations authorized to receive tolls, and was probably unconstitutional as creating a special law where a general law may be made applicable. (See Krause v. Durbrow, 127 Cal. 681.) The amendment makes the section applicable to all corporations.

391. The amendment makes the section applicable to persons and companies as well as to corporations.

392. The amendment makes applicable to an execution sale of franchises the law of redemption applicable to other sales of real property.

393. Omits the words "upon which the taxes are paid," that having apparently no relevance to the section.

399. This section, which purports merely to designate the place in the Code of Civil Procedure where the dissolution of corporations is provided for, does not state any rule of law and constitutes but an imperfect index to the provisions referred to, and is, therefore, repealed.

400. The change consists in the substitution of the word "a" for "such."

401. The design of the amendment is to require the written assent of stockholders representing two thirds of the capital stock instead of permitting two thirds in number of the stockholders to act by their written consent. The change consists in the substitution of the words "two thirds of the number or of stockholders representing two thirds of the capital stock" in place of that number of stockholders or members.

403, 404. The amendment of 1905 added a new chapter, entitled "General Provisions Affecting Corporations." Said chapter is made up of the... [illegible] section 403 [illegible]

CIVIL CODE—Continued.

SECTION.

405, 406, 407. These sections codify the statute of 1871-2, page 826, as amended 1899, page 111, and section 1 of the statute of 1880, page 21.

408, 409, 410. These sections codify the statute of 1901, page 108.

421. There being two sections 421, referring to the same subject, one approved March 3, 1905, and the other approved March 21, 1905, the former was repealed and the latter left intact. Note the provisions of section 2 of the repealing act. (Stats. 1907, p. 597.)

428. The change consists in the insertion of the words "at once" before "reinsuring."

431, 452. Old section 431, which dealt with the amounts to be received by life insurance companies, and stood in a chapter entitled "Fire, Marine, and Title Insurance Corporations," is transferred to a more appropriate chapter, and numbered 452.

448. This section exempts accident insurance companies from stamp duties, but as there are no such duties under the law as it now stands, the section is unnecessary, and is, therefore, repealed.

452a, 453. The statute of 1873-4, page 745, as amended by the statutes of 1880, page 25, and 1901, page 6, relating to mutual benefit associations, is codified in the above sections, and a new chapter, entitled "Mutual Benefit and Life Associations," is added, to consist of sections 452a and 453.

453a, 453b, 453c. The statute of 1875-6, page 689, concerning the powers of underwriters, as amended by the statute of 1897, page 223, is codified in the sections above named, a new chapter being added, entitled "Corporations to Discover Fire, and to Save Property and Human Life From Destruction Thereby," to consist of sections 453a, 453b, 453c.

453d, 453e, 453f, 453g, 453h, 453i, 453j, 453k, 453l, 453m, 453n, 453o, 453p. The above sections are a codification of the statute of 1901, page 126, relating to life, health, accident, and annuity or endowment insurance on the assessment plan. They are placed in a new chapter, entitled "Life, Health, Accident, and Annuity or Endowment Insurance on the Assessment Plan."

465a. This section is a codification of the statute of 1893, page 208, relating to the operation of railroads.

468. The amendment consists in codifying and adding to the old section the provisions of the statute of 1880, page 33, to compel the operation of railroads, and of the statute of 1897, page 5, to provide for the management and operation of railroads above certain elevations.

475a. Section 2 of the statute of 1880, page 21, authorizing railway and other corporations organized under the laws of this state or of any state or territory of the United States to do business in this state, on equal terms, is codified in this section.

481. The amendment consists in the substitution of the word "its" for "their," and the substitution of "it" for "they," thus correcting errors of grammar.

489. Section 11 of the statute of 1880, page 47, defining the powers of the board of railroad commissioners, is substituted in place of the old section 489. The latter had been inoperative since the adoption of the Constitution of 1879.

493. The change consists in the substitution of the words "The provisions of section four hundred and ninety-two" in place of "This act."

494. In 1889 a section relating to the sale of railroads was added to the Code, and numbered 494. In 1903 a new section was added, also numbered 494, and clearly intended to supersede the old section 494. Accordingly, it is thought advisable to repeal the earlier section.

513. The change consists in the omission of the words "they were" before the word "before." The omission does not change the meaning of the section.

514. The change consists in the omission of that part of the section excepting from its operation the counties of Butte, Del Norte, Humboldt, Klamath, Plumas, and Sierra.

517. The section as it stood before the change authorized the toll-gatherer to prevent from passing through his gate persons leading or driving animals or vehicles subject to toll. The form of the section has been changed to express what was doubtless originally intended by the legislature.

518. The change consists in the insertion of the words "or any vehicle or animal" after "passenger."

522. The change consists in the substitution of the word "its" in place of "their," thus correcting an error of grammar.

524. The statute of 1897, page 191, authorizing municipal corporations to construct paths and roads for the use of bicycles and other horseless vehicles, is codified in this section.

528. The change consists in the insertion [illegible] other governing body

CIVIL CODE—Continued.

SECTION.

529. The change consists in the insertion of the words "or other governing body having authority in that behalf," after "supervisors."

530. The change consists in the insertion of the words "or other governing body having authority in that behalf," after "supervisors."

536, 537, 538, 539, 540. The change consists in the insertion of the words "or telephone" after the word "telegraph," thus including telephone companies within the operation of the above sections.

549. The change consists in the omission of the two sentences following the word "charge," said sentences having been superseded by the provisions of the Constitution of 1879, providing for the mode in which water rates shall be fixed.

550. This section is an expression of the constitutional provisions found in the Constitution of 1879, respecting the right of corporations to use streets for laying water pipes, and is, therefore, repealed.

551. The design of the amendment is to better express the purpose of the section and to remove the objections that it may be unconstitutional in vesting the supervisors with an arbitrary power to require or not require bridges, and to supply the present defect in not providing any means of coercing the performance of the duty created.

583b. This section is a codification of the statutes of 1893, page 183, and 1897, page 27, the only change made being in the provisions concerning the person who is to make the report. The original statute provided that the report should be made by the president or secretary. It has been thought best to impose the duty upon a single officer, so that it cannot be evaded by one officer, by his saying that it was the duty of the other, or that he had supposed the other had, or would, perform it.

586, 587, 587a. Revises the whole of Title XI of Part IV of Division First of the Civil Code, respecting mining corporations. Sections 586 and 587 are not changed, but simply renumbered. Section 587a contains substantially the matter in the old section 301, the word "corporations" being substituted for "companies," and the words "and to cause notice of the time and place fixed for such meeting to be mailed to each stockholder of each of such corporations at his last known place of residence or business at least ten days before the time fixed for such meeting" being inserted. The matter added is designed to provide the mode in which notices may be served on stockholders.

588, 589, 590. The statute of 1878-4, page 866, as amended in 1880, page 34, and 1897, page 38, is codified in the above sections, the only substantial change made being in the omission of the proviso in section 1 of the amendatory act of 1897, limiting its provisions to corporations "whose stock is listed and offered for sale at public exchange." The provisions of the part of the section omitted are unconstitutional. (See Johnston v. Tuolumne, 127 Cal. 604.)

591, 592, 592a, 592b, 592c, 592d, 592e. Add a new title to the Code, designated "Corporations for the Formation of Chambers of Commerce, Boards of Trade, Mechanics' Institutes, and other Kindred Organizations," the matter contained in said chapter being a codification of the statute of 1905-6, page 469, as amended in 1907-8, page 5, and 1885, page 76, respecting chambers of commerce.

593. The change consists in substituting the word "title" for the word "part," the last word in the section.

607, 607a, 607b, 607c, 607d, 607e, 607f, 607g. The subject-matter of the above sections is taken from the statute of 1873-4, page 493, as amended in 1901, page 285, and 1903, page 69—to prevent cruelty to animals; the statute of 1875-6, page 880, relating to the incorporation of societies for the prevention of cruelty to children; the statute of 1877-8, page 812, for the protection of children; and the statute of 1877-8, page 815, relating to children. Section 1 of the act of 1875-6, page 880, is codified in section 607. Subdivision 7 of section 2 of the same act is codified in section 607a, and section 3 in section 607b. Section 607c is a codification of section 4 of the act of 1875-6, page 880, and section 4 of the act of 1873-4, page 493. Section 5 of the act of 1875-6, page 880, is codified in section 607d; and section 14 of the act of 1873-4, page 493, as amended in 1903, page 69, and section 5 of the act of 1877-8, page 813, are consolidated and codified in section 607e. Section 5 of the act of 1873-4, page 493, as amended in 1901, page 285, is codified in section 607f, and section 3 of the act of 1877-8, page 812, is codified in section 607g, with the exception of subdivision 6 thereof, which is an addition thereto, to cover the matters referred to in the act of 1877-8, page 813.

CIVIL CODE—Continued.

SECTION.

620, 630, 630*a*, 631, 632. The purpose of the amendment is to make the above sections applicable to electric as well as to gas-light corporations. To accomplish this, the following changes have been made: In section 620 the words "or direct or primary wire" are inserted after "main," and the words "or electricity" are inserted in two places after "gas." Section 630*a* is a new section, to extend the provisions of the chapter "Electric Light Companies," and provide for advances similar to those made to gas companies by subscribers. In section 631 the words "any owner or manager of gas or electric works, or agent of such owner or manager, exhibiting written authority, signed by such owner or manager, or" are inserted at the beginning of the section; the words "or electric light" are inserted after "gas"; the words "or electricity" are inserted after "gas," and the words "or electric meters" are inserted after "meters." In section 632 the words "or electricity" are added after "gas" in three places, and the word "wires" is inserted after "pipes."

638*a*. This section is a codification of section 10 of the statute of 1883, page 220.

648½. This section is no longer necessary; the statute referred to therein, to wit: that of 1877-8, page 955, having been repealed (Stats. 1897, p. 243). The section is, therefore, repealed.

655*a*. This section is a codification of that part of the statute of 1877-8, page 883, defining cooperative corporations, and the section is placed in a new title designated "Cooperative Business Corporations." That part of the statute declaring that the by-laws may provide for the number of votes to which each shareholder shall be entitled is omitted for the reason that it is special legislation, and probably unconstitutional within the decision in Krause v. Durbrow, 127 Cal. 681.

655*b*, 655*c*, 655*d*, 655*e*, 655*f*, 655*g*, 655*h*, 655*i*, 655*j*, 655*k*, 655*l*. The statute of 1895, page 221, is codified in the above sections, which are placed in a title designated "Cooperative Business Associations."

703. The words "in the district court," where they occur in the present section, are omitted.

822. A clerical error is corrected by inserting "has" after "property."

842, 843. The statute of 1880, page 202, relating to the protection of owners of ditches and flumes, is codified in the above sections. Section 3 of the statute is not codified for the reason that any matter in it which should be retained is fully covered by the general rules of law.

970. The amendment consists in the substitution of the words "by or under authority of the laws of the United States" after "steamers," in place of the words "under authority of the acts of congress, approved August thirteenth, eighteen hundred and fifty-two, and April twenty-ninth, eighteen hundred and sixty-four."

993. The change consists in the addition of the words "and the person transferring it may transfer with it the right of using the name under which the business is conducted." The purpose of the amendment is to authorize the transfer of the right of using the name with the transfer of the good-will of the business.

1096. Section 1 of the statute of 1873-4, page 345, relating to conveyances of real estate, is codified in the above section. The rest of the statute should be added to the Political Code.

1161. The change consists in the substitution of the words "the person executing the same in behalf of the corporation" in place of "its president or secretary." The reason for the amendment is that an instrument may be executed on behalf of a corporation by an officer or person other than its president or secretary, when authorized by its board of directors. The section as it heretofore stood appeared to sanction its execution by those officers only.

1181. The change consists in the substitution of the word "township" for "district" before "for."

1185. The change consists in the substitution of the words "person who executed it on behalf of the corporation," in place of "president or secretary of such corporation." (See note to section 1161.)

1190. The change consists in the substitution of the words "the person (or officer) who executed the within instrument on behalf of the corporation therein named," in place of the words "the president (or the secretary) of the corporation that executed the within instrument." (See note to section 1161.)

1202. The change consists in the substitution of the word "superior" for "district," before "court."

1203. The change consists in the substitution of the word "superior" in the place of "district," before "court."

1218. This is a new section. It is self-explanatory.

CIVIL CODE—Continued.

SECTION.

1263. The change consists in the insertion of the words, "and if the claimant is married the name of the spouse," after "family."

1269*a*, 1269*b*, 1269*c*. The statute of 1873-4, page 582, relating to homesteads belonging to insane persons, is codified in the above sections, which are placed in a new chapter, entitled "Alienation of Homesteads of Insane Persons."

1275. The change consists in the insertion of the word "that" before "corporation," and in the insertion of the words "counties, municipal corporations and corporations" after "that." The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns, of the state, to receive property by gift, bequest and devise.

1276. The change consists in the substitution of the words "the same" in place of "his name" after "sign." The purpose of the amendment is to avoid the strict construction given to subdivision 4 in Estate of Walker, 110 Cal. 387.

1285. The change consists in the insertion of all the matter after the word "chapter," the purpose being merely to state what has always been understood to be the rule in this state respecting bequests of personal property, viz: that it may be bequeathed in accordance with the law of the testator's domicile.

1300. The change consists in the omission of the word "unmarried" before "woman." The purpose of the amendment is to apply the same rule to wills executed by married and unmarried women with respect to the revocation by subsequent marriage.

1301. The change consists in the addition of the last sentence, and is intended to change the rule of Smith v. Olmstead, 83 Cal. 582.

1307. The change consists in the addition of the last sentence. (See note to preceding section.)

1327. The change consists in the addition of the clause following the word "intention," and provides that the words in a will need not be taken in a technical sense, if it appears to have been drawn by the testator, and that he was unacquainted with such sense.

1304. The change consists in the transposition of the words "within four years after the devisor's death," by striking them out at the end of the section, where they now appear, and placing them after the word "unless."

1376. The change consists in the addition of the clause following the word "state," and has been rendered necessary by the proposed amendment to section 1285.

1381. In 1905 a clerical error was corrected by renumbering the subdivisions, and certain errors of grammar were corrected. The words "or grandchild" were inserted after "child"; the words "nor the child or grandchild of a deceased brother or sister" were inserted after "sister"; the words "children of such deceased spouse and the descendants thereof, and if none, then to," were also inserted. In the second line of subdivision 8, the word "issue" was substituted for "kindred," and the subdivision amended to overcome such cases as Estate of McCauley, 138 Cal. 548. Upon further consideration the section, as thus amended, being deemed to be still unsatisfactory, it was again amended in 1907 by entirely rewriting subdivision 8.

1388. The amendment consists in declaring that if an illegitimate child has been legitimated, his estate on his death is succeeded to as if he were born in wedlock.

1395. The change consists in the substitution of the words "other heirs" for "other lineal descendants," and in the substitution of "heirs" for "issue."

1399. The change consists in the substitution of the words "other heir" for "other lineal descendant" before "receiving," and in the substitution of "heirs" for "issue" after "leaving."

1405. The change consists in the substitution of the words "superior court" for "district court" before "or," and in the substitution of the words "he appears in the court in which such information was filed and asks for a judgment or order entitling him thereto," in place of the words "proof to the satisfaction of the state comptroller and treasurer he produced that he is entitled to succession thereto." The design of the amendment is to require the proof of the right to succession to be made in court instead of vesting the controller and treasurer with power to determine the question.

1406. This section is recast to conform to the proposed amendment to the last section.

1409. This is a new section, and is limited to cases where

CIVIL CODE—Continued.

SECTION.

1624. The change consists in the addition of subdivision 7. The cases in which it is sought to establish by parol evidence alleged agreements to provide for a person by will are becoming so numerous as to warrant the assumption that the reasons inducing the original enactment of the statute of frauds apply with especial force to agreements of this class and that they ought to be brought within that statute.

1626. The change consists in the omission of the word "oral" before "negotiations."

1828. A new section, added to protect banks in paying joint accounts to survivors, in due course of business, without waiting for any authorization of court.

1858, 1858a, 1858b, 1858c, 1858d, 1858e, 1858f. The statute of 1877-8, page 949, relating to warehousemen's and wharfingers' receipts, is codified in the above sections.

1865. The section is amended to incorporate therein the provisions, upon the same subject, of sections 3130, 3137, and 3138 of the Political Code.

1871. The section is amended to incorporate therein the provisions of sections 3139, 3140, and 3141 of the Political Code.

1929. The change consists in the substitution of the words "want of ordinary care" for "ordinary negligence."

1930. The change consists in the substitution of the words "he is liable to the letter for all damages resulting from such use, or the letter," in place of the words "the letter who is responsible for its safety during such use in all events, or."

1932. The change consists in the substitution of the words "want of ordinary care" for "ordinary negligence."

2161. The change consists in the insertion of the words "or telephone" after "telegraph" in two places, thus making the section applicable to both telegraph and telephone companies.

2180. The change consists in the substitution of the word "need" for "may." The present section would seem to prohibit a carrier by stage from receiving more than sixty pounds of luggage, wherein it was manifestly intended only to relieve him, at his election, from receiving a greater amount.

2195. The change consists in the substitution of the words "want of ordinary care" for "ordinary negligence."

2236. The change consists in the addition of the words "and for the value of its use" after "events."

2334. The change consists in the substitution of the words "want of ordinary care" for "ordinary negligence."

2541. The change consists in the addition of the clause following "mortgagee," and is designed to authorize a mortgagee in whose favor insurance is effected, to perform for the mortgagor any acts to be performed by him, with the same effect as if performed by the mortgagor.

2903. The change consists in the addition of the clause after the word "foreclosed." The design of the amendment is to state and apply the rule of equity in such cases, it being feared that the declaration of a similar rule in section 2904, and its omission in this section might lead to doubt.

2918. The change consists in the substitution of the word "value" for "a good consideration" after "for."

2978. This section merely declares the law already existing upon the subject. It is deemed proper to have the same expressed in the Code.

3061. The statute of 1885, page 109, concerning liens in favor of persons working on threshing machines, is codified in this section.

3062, 3063, 3064. The statute of 1891, page 90, is codified in the above sections.

3065. So much of the statute of 1877-8, page 747, as amended in 1880, page 38, 1887, page 69, relating to loggers' liens, as is deemed necessary to be preserved, is codified in the above section.

3131. The change consists in the insertion of the words "or his agent" after "holder." The design of the amendment is to conform the section in this respect to section 3136.

3170. The change consists in the insertion of the word "cannot" after "residence," to correct a manifest error.

3197. The change consists in the omission of the words "or other good consideration," as they occur after "value." The presence of these words implies that a consideration other than "for value" may support a promise in writing to accept a bill. Such is not intended to be the law.

3235. The change consists in the substitution of the word "a" for "any" before "person"; in the omission of the words "but in any of the other states west of the Rocky Mountains" after "state"; in the omission of the third subdivision; and in the renumbering of the fourth subdivision rendered necessary thereby. The old section divided for its purposes that part of the United States not included within this state into two parts apparently ignoring the states now existing situated partly on each side of those mountains. It has seemed best to abolish the distinction altogether and to provide a uniform rate of damage for all the states, irrespective of their position with reference to those mountains.

CIVIL CODE—Continued.

SECTION.

3294. The change consists in the substitution of the words "express or implied" for "actual or presumed," and in the substitution of the words "the plaintiff, in addition to the actual damages, may recover," in place of the words "the jurors, in addition to actual damages, may give." As the section now stands it appears to apply to jury trials only. This, of course, was not the intention of the legislature.

3344a. The new section incorporates into this code the principle now declared in section 3344 of the Political Code.

3366. The change consists in the substitution of the words "as provided by the laws of this state," in place of the words "in the cases specified in this title and in no others." The purpose is to enlarge the scope of the section.

3451. The change consists in the insertion of the words "or creditors or to some other person or persons in trust for such particular creditor or creditors" after "creditor." The rule stated in the section as amended by the addition of the clause above quoted is the rule heretofore enforced in this state (Lawrence v. Neff, 41 Cal. 566; Hendley v. Pfister, 39 Cal. 283; Priest v. Brown, 100 Cal. 626); but some doubt had been cast upon the subject by the later case of Sabichi v. Chase, 108 Cal. 81.

CODE OF CIVIL PROCEDURE.

SECTION.

10. Merely adds the Saturday half-holiday sentence, in order to make this section correspond to the amendment adopted to section 10 of the Political Code in 1905 and section 7 of the Civil Code in 1907.

116. Repealed, as it related wholly to prosecution of public offenses, and its provisions were incorporated in the Penal Code, section 1425, as amended in 1905.

134. The amendment recast the section, substituting the words "on any of the holidays mentioned in section 10," instead of attempting to mention the holidays, which are always changing. The amendments are designed to conform to the section in the Constitution. (See Reclamation District v. Hamilton, 112 Cal. 610.)

135. The amendment changes the phraseology of the section to conform with section 10 and with the amendments made to section 134.

139. The change strikes out the words "for one week." Neither the sheriff nor the clerk can, under the Constitution, be authorized to adjourn court, and thus close it for a definite time, other than from day to day.

140. Repealed, because both unnecessary and unconstitutional.

144. The amendment consists in the insertion of the word "county" in place of "city and county," where those last words occur in the section, and in omitting the words "city and county" when they occur earlier in the section, they being unnecessary in view of the amendment to section 17 adopted in 1903 (Stats. 1903, page 134).

230. The amendment consists in changing the word "if" to "of," to correct an error.

248. A new section settling the practice with reference to panels of jurors in the superior court in counties having two or more judges of that court.

387. The amendment consists in adding the words, "within ten days from the service thereof, if served within the county wherein said action is pending, or within thirty days if served elsewhere," thus removing any ambiguity respecting the time within which the complaint in intervention must be answered.

388. The words "and the individual property of the party or parties served with process" have been added, thus avoiding multiplicity of suits.

389. The words "or to determine conflicting claims thereto" have been added, thus authorizing the bringing in of new parties in actions to determine conflicting claims of real or personal property, and thus avoiding multiplicity of actions.

392. The former provision at the end of the section, that if in an action to recover real property an injunction is at any time applied for, the proper county for the trial is that in which the defendant resides, is omitted. The old provision is inconsistent with section 5 of Article VI of the Constitution, requiring actions of this character to be brought in the county in which the property, or some part thereof, is situated.

394. The word "[illegible]"

Copy No. 3.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

District Court of Appeal, Sacramento.

C. P. POMEROY,
REPORTER.

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WALTER VAN DYKE, Justice.

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