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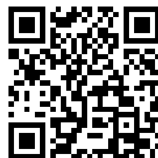

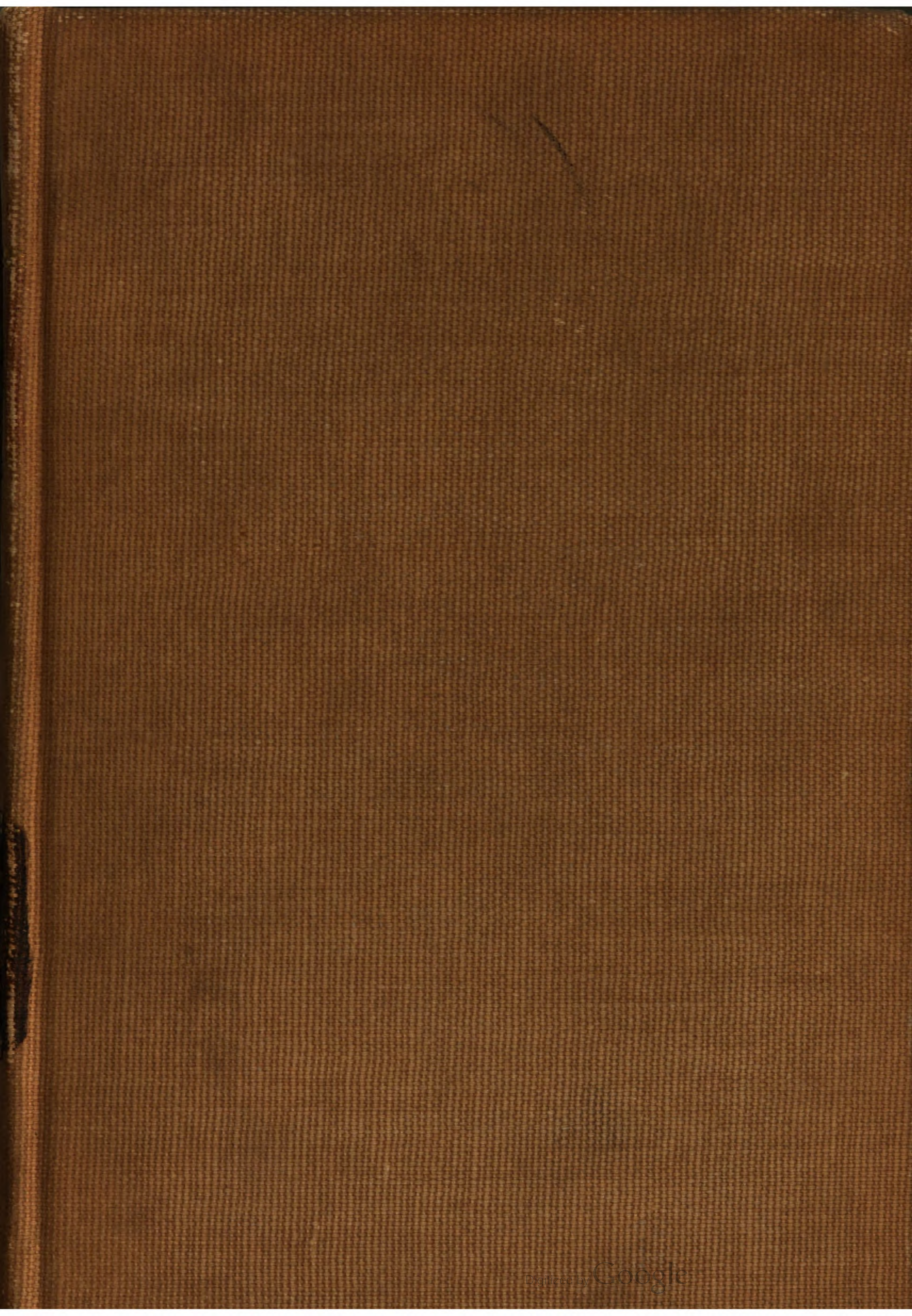
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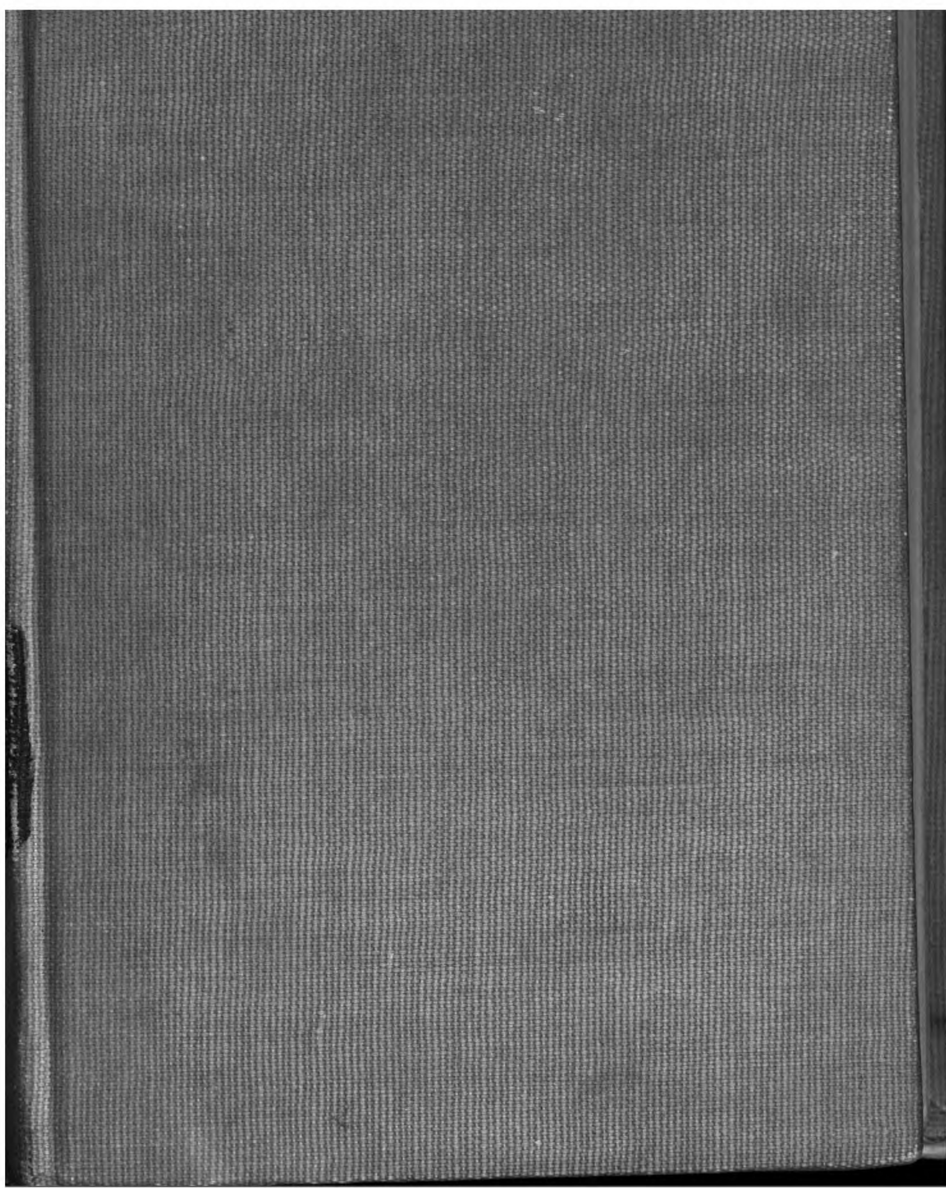

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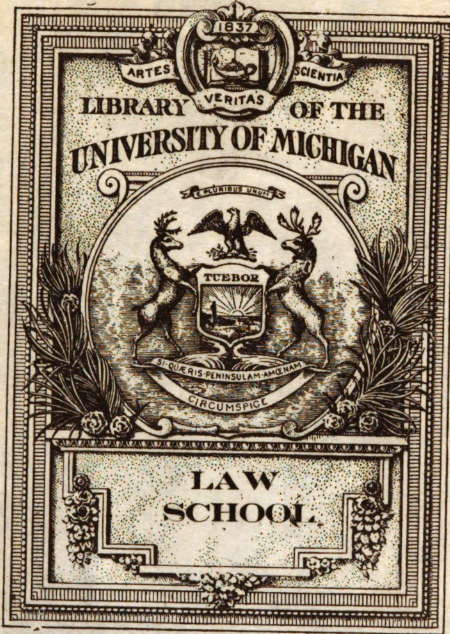

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THE MONTHLY WESTERN JURIST.

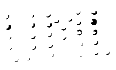
VOLUME I.

FROM MAY, 1874, TO APRIL, 1875.

52299

THOMAS F. TIPTON,

EDITOR.



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THE

MONTHLY

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MAY, 1874.

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THE

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WESTERN JURIST.

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JUDGMENTS IN CRIMINAL CASES TO TAKE EFFECT IN FUTURO.

The question of the time of the commencement of the sentence of imprisonment in a criminal case, where the party is at the time serving out a sentence of the court, or in cases where there is a second conviction against the same party at the same term of court frequently arises in practice; this question arose in the case of *Kite* v. *Com.*, 11 Met., Mass., p. 585; and the court were unanimous in the opinion that in a criminal case it is proper to make one term of imprisonment commence when another terminates. The court say, "It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency, that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires; then by its terms the sentence in question takes effect as if the previous one had expired by lapse of time, nor will it make any difference that the previous judgment is reversed for error. It is voidable only and not void; and until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the time at which another sentence shall take effect." To the same effect is *King* v. *Wilkes*, 4 Burr, 2575, decided in 1768. The second judg-

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ment in this case sets up the first judgment and orders the imprisonment in the second case to commence at the expiration of tho first sentence. Afterwards a writ of error was brought returnable in Parliament upon each judgment, and both judgments were affirmed; and so far as I know, this has been the practice in England since that time. The same question arose in *Russell* v. *The Commonwealth*, 7 Sergant and Rawle, 489; and the court say, "As to the imprisonment to commence at a future time, it is warranted by principle, practice, and authority. It is not denied by counsel for the prisoner that it has been the common practice in the courts of this State," affirming *King* v. *Wilkes supra*. And the same court afterwards—1833,—held that where a person had been previously sentenced to imprisonment for a term to commence immediately after the expiration of a preceding sentence and the first sentence having been reversed, that the term of the second sentence began to run from the time of the reversal of the first. *Brown, alias Potter* v. *Com.*, 4 Rawle 53. See also, to the same effect, *Woodward* v. *State*, 1 Ohio St. 427; *State* v. *Gibson*, 5 Day 175; *Williams* v. *State*, 18 Ohio St. 47; *Picket* v. *State*, 22 Ohio St. 408; *Com.* v. *Leath*, 1 Va. Cases 151; *People* v. *Forbes*, 22 California 135. But to consider this question on principle, take a case where a man has been sentenced to imprisonment for one offense and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offense commence after the expiration of the first imprisonment. Would it not be absurd to make one imprisonment for two offenses? Nor does the absurdity end there, for unless the imprisonment for the last offense is to begin where the first ends, it would be impossible under our system to punish the offender, in certain cases, for the last offense; suppose for instance, one who has been convicted of horse stealing and sentenced to a term of three years imprisonment should afterwards be convicted of the crime of manslaughter and sentenced to two years imprisonment, the two years must either be made to commence after the expiration of the three years or be merged in them, and thus be no punishment at all. *Miller* v. *Allen*, 11 Ind. 389; *James* v. *Ward*, 2 Metcalf, Ky. 271. The sentence upon the termination of which the commencement of the second is made to depend must be made a part of the second sen-

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tence, for the reason that each judgment and sentence must stand or fall by the record made in the case. On writ of error in the case of *Picket* v. *The State*, 22 Ohio St. Supra. The court say, "The sentence upon the termination of which the commencement of the one in question is made to depend is only referred to in the record before us by the title and number of the case. It does not appear at what term, nor except by remote inference, in what court it was pronounced. The number of the case is given, but this number is no part of the sentence, nor is it a necessary part of the record of the case. The terms of a sentence of imprisonment ought to be so definite and certain as to advise the prisoner and the officers charged with the execution of the sentence, of the time of its commencement and termination, without their being required to inspect the records of any other court or the record of any other case." In *Williams* v. *The State Supra*, it was held that where the sentence, as shown by the record, is to be imprisonment in the penitentiary "for a further term of ten years, to commence at the expiration of the sentence aforesaid," and the record not showing to what the word aforesaid relates, the judgment and sentence was reversed, and the cause remanded to the Court of Common Pleas for sentence and judgment in accordance with law, and it seems that the error does not reverse the whole case but only the judgment and sentence. See also, 22 *Ohio State Supra*; 12 *Wisconsin* 534, 313, 1 Barnwell & Cresswell 711, 5 E. L. E. Reports 310. It is the practice of some of the courts in this State to fix the time definitely when the second sentence shall commence; this practice is clearly wrong and cannot be maintained on principle; the question has never been decided by our Supreme Court, but the question arose before Judge McAllister at chambers in the case of "*The People ex rel. Robert Stover and John Anderson* v. *Elmer Washburn*, Warden of the Illinois Penitentiary, reported vol. 3, Chicago Legal News p. 251, the judge said, "This is a case upon *habeas corpus* issued at chambers to the Warden of the State Penitentiary at Joliet, upon the petition of Robert Stover and John Anderson, who claimed that they were imprisoned by such warden without the authority of law. The return to the writ discloses this state of facts. At the April term, 1869, of the Sangamon Circuit Court, Stover and Anderson were jointly indicted in three separate

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indictments for larceny on May the 6th, but at the same April term they both having pleaded guilty to all of the indictments, the court proceeded to sentence them; upon the first they were sentenced to imprisonment in the penitentiary of the State of Illinois for and during the term of one year; upon the second indictment for and during the term of one year, to commence on the 6th day of May, A. D. 1870, and upon the third for and during the term of one year, to commence on the 6th day of May, A. D. 1871. The petitioners were conveyed to the penitentiary by virtue of the sentences (or, strictly speaking, by virtue of the first one,) where they have ever since remained. It also appears that under the statutes of 1863 and 1869 these prisoners by their good conduct and avoidance of any infractions of the rules or laws of the prison during the term of imprisonment, commencing on the 6th of May, 1870, earned a credit of twenty-six days, which were duly allowed in pursuance of the statute, which is as follows: "The convicts in the Illinois Penitentiary at Joliet, against whom there shall be found no record of the infractions of the rules or laws of the prison or of the State and shall demean himself or herself orderly and peaceable shall be deemed to have earned a credit for good conduct of the number of days, etc., and shall have the same deducted from his or her term of imprisonment and shall be discharged accordingly." Another section makes these provisions applicable to all convicts theretofore or thereafter sentenced. This statute which was wisely intended to supply a motive for obedience and good conduct to the unfortunate class of our fellow creatures who may become the inmates of the State penitentiary, is just as operative in fixing the period of discharge of a prisoner as lapse of time prescribed in the sentence. If so, then the term of imprisonment of these men under the second sentence expired on the 10th of the present month. But the sentence upon the third indictment, by its terms, does not commence until the 6th day of May next. By what authority then does the warden detain them from the 10th of April to the 6th of May? He cannot treat the case as presenting an emergency and deny the credit earned in order to lengthen out the second sentence until the 6th of May. They have observed and kept all the rules and laws of the prison and the State, and according to the table in the statute fixing the ratio of credits, they

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have an absolute right to the deduction from their second term of the number of days as prescribed, so that the conclusion is clear and irresistible that their second term has expired and the third does not commence until the 6th of May next. There is therefore no authority for detaining them during the interim in the penitentiary. I have now to commit them to the county jail of Sangamon county, or require them to give bail to submit themselves to the imprisonment to which they are sentenced, which is to commence on the 6th of May next. Suppose I did, and they are unable to give bail, what will I do with them? I could not commit them to the penitentiary for want of bail. They could not be committed to the jail of Sangamon county, because their cases have gone to final judgment and the Circuit Court lost all jurisdiction over them, nor to the jail of this county, because no offense has been committed here. I can conceive of no other way of disposing of them but to discharge them as illegally imprisoned. An easy way of avoiding such a state of things is for the Circuit Courts, when sentencing a prisoner upon two indictments, to make the second term commence upon the expiration of the first instead of upon a particular day. Prisoners discharged." To obviate this question the Legislature of this State, laws of 1872, page 295, chapter entitled Convicts, passed the following section: § 3. "That whenever any convict is committed under several convictions with separate sentences, they shall not be construed as one continuous sentence under this law in the granting or forfeiting good time, and when any convict is committed at the same time with separate sentences and he should made good time under any of those sentences then the other sentences shall commence to run at the termination of the sentence under this law until the sentences are entirely fulfilled."

This statute only applies to cases where the convict in the penitentiary has made good time under the statute and does not apply to cases where the first judgment and sentence shall have been reversed, nor to cases of pardon, neither does it apply to cases where the punishment shall be by imprisonment in the county jail. In the case of *Borschenious* v. *The People* 41 Ill. 236, our Supreme Court held the following judgment to be sufficient. "That the people of the State of Illinois recover of said defendant ten dollars upon each of the ten counts in the said indictment, amounting in the aggregate

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to the sum of one hundred dollars for their fines ; also their costs and charges in and about this prosecution expended, and that execution issue therefor." The court say, "The clerk might have made a separate entry of the judgment on each count, but it was wholly unnecessary to do so. This one entry embodies a several judgment on each count. Although several counts are sometimes introduced into an indictment for the purpose of describing the same offense, yet in theory each count presents a different offense, and in cases of this character (for selling liquor) on a general plea or verdict of guilty, the court must assess a fine under each count as for so many distinct offenses. These are so many distinct convictions." Under our present liquor law (Laws of 1872, p. 554,) imposes both fine and imprisonment, and upon convictions under this statute upon more than one count, the judgment for the imprisonment upon the second count should be made to commence at the expiration of the sentence upon the first count, and the third at the expiration of the second, &c. The judgment upon the different counts being several. The sentence runs concurrently upon each count, *Miller* v. *Allen* 11 Ind. and *James* v. *Ward*, 2 Metcalf Ky. Supra, unless the form of the judgment should follow the form above indicated. It seems that otherwise the sentence upon each count would be a sentence in *presenti*, and it seems clear from the authorities above cited that the only cases where there is a conviction and sentence of imprisonment, that the sentence must commence in *presenti*, unless it shall appear to the court that the party is at the time serving out a sentence of imprisonment, or has been convicted and sentenced upon a former indictment ; and in cases of convictions upon an indictment containing several counts. Whatever, therefore, may be the intention of a court in rendering a judgment that the prisoner be confined for a given number of days upon *each* count of the indictment the legal effect of the judgment is, that shall be confined only for the given number of days, that such confinement shall be upon each count of the indictment, and that the term of imprisonment shall be upon each count of the indictment, and shall commence and terminate at the same periods, unless otherwise provided in the judgment and sentence as above indicated.

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WRIT OF ASSISTANCE.

A writ of assistance is, in ordinary cases, the first and only process for giving possession of land under an adjudication of a court of chancery. And this, where it is so provided in the decree, will be granted upon the sale being confirmed, and proof that the purchaser has received a deed of conveyance from the master, and a copy of the decree having been shown to the party in possession, accompanied by a demand in writing of possession which has been refused. After a foreclosure and sale of mortgaged premises, the mortgagor refusing to deliver up the possession on demand to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, though the delivery of the possession is not made a part of the decree.

Our Supreme Court in the case of *Williams* v. *Waldo et al.*, 3 Scam. 264, per Treat, Justice, say, "It is a well established principle, that when a court of chancery obtains jurisdiction of the subject matter of a suit, it will retain the jurisdiction, to the end that complete justice may be done between the parties. It has the power to decree a sale of the mortgaged premises, and thereby to pass the title to the purchaser, and will put him in possession instead of driving him to his action of ejectment. It would be but partial justice to adjudicate upon the rights of the parties, and vest the title in the purchaser, without affording a remedy to carry the adjudication into full effect. The court having the power to dispose of the title, has the right to control the possession. The mode by which the possession is to be transferred is well settled by the practice in courts of equity."

The writ of assistance cannot be awarded by the clerk, but must emanate from the court. When a writ of assistance becomes necessary to put a party in possession of land to which he may be entitled under a decree of the court, he is required to present the facts requiring the assistance to the Circuit Court, so that the court itself may judge of the propriety of awarding the writ, *Bruce* v. *Roney et al.*, 18 Ill. 74. The writ cannot issue against a person in possession of premises sold under a decree rendered in a

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suit to which he is not a party, if his possession began before the commencement of the suit. Not being a party nor coming in *pendente lite* his rights are in no way affected by the suit, and his right to the possession cannot be adjudicated in this summary manner. *Gilcreest* v. *Magill*, 37 Ill. 300; *Brush* v. *Fowler*, 36 Ill. 58. The court has no jurisdiction by a summary proceeding to determine the rights of third persons claiming title to premises who have recovered the possession by legal and adverse proceedings against a party to the suit under a claim of right which occurred previous to the filing of the bill of foreclosure, *Frelinghuysen* v. *Colden* 4 Paige, 204. The power of the court to give possession to the purchaser at a Master's sale, by a summary proceeding only extends to those persons who are parties to the suit in which the sale is directed, or those who have come into possession under, or with the assent of, those who are parties, subsequent to the commencement of the suit. The writ must run against the party or parties in possession, and can only go against the parties to the suit, or against those who have come into possession under them since the commencement of the suit, *Frelinghuysen* v. *Colden*, *supra*, *Van Hook* v. *Throckmorton*, 8 Paige, 33; *Sea. Insurance Co.* v. *Stebbins* 8 Paige, 565; *Brush* v. *Fowler*, 36 Ill., 58. The sheriff having the writ of assistance is not bound to execute it unless it runs against the party in possession; whenever the sheriff finds a person in possession of the premises not named in the writ he is informed that the decree was not against the party in possession, but other parties. He should in that event return the writ with the fact that the parties named in the writ are not in possession, and with the name of the party in possession. If the purchaser shall then desire to proceed against the party or parties in possession, he must give the party in possession notice and apply to the court, and if he can then satisfy the court that the party in possession entered *pendente lite* the Court will order the writ against the party in possession; otherwise the purchaser must resort to his common law action. The writ of assistance will not justify the officer to whose hands it may come in putting out of the possession of the premises, a party who was neither a party to the suit or named in the writ, *Brush* v. *Fowler*, *supra*, *Jansen* v *Acker*, et als, 23 Wed. 480. And should the sheriff at-

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tempt to execute the writ in such case against a person in the quiet possession of real estate, claiming to own the fee, such person would be entitled to an injunction restraining the sheriff from executing the same, *Goodenough & Warner* v. *Sheppard*, 28 Ill., or might maintain trespass, *Brush* v. *Fowler ; Jansen* v. *Acker, et als, supra*. When the decree directs the party in possession to surrender up the possession to the purchaser, the court upon an affidavit showing the service of a copy of the order accompanied with a demand of the possession and a refusal of the party to comply, will issue the writ of assistance to put the purchaser in possession. But where the decree contains no such order the court on motion, and reasonable notice to the party, will make the order, and upon the like service of a copy and demand of possession the court will, on motion and without notice, order an injunction against the party to deliver possession, and then on affidavit of the service of the injunction and refusal to deliver possession, a writ of assistance to the sheriff to put the purchaser in possession issues of course on motion and without notice. This was determined to be the proper practice in the case of *Kenshaw* v. *Thompson, et als*, 4 John, Ch'y R. 610, upon a careful examination of the practice in the English courts of chancery, and affirmed by our Supreme Court in *Williams* v. *Waldo, et als.*, 3 Scam. 264, *supra*. The writ should issue against all defendants to the decree, and in case the possession of the premises shall have been transferred after the commencement of the suit such parties as the Court, on hearing of the motion, shall determine, entered *pendente lite* should also be named in the writ. A party purchasing the subject of litigation *pendente lite* is as to the subject matter a party to the decree. Our Supreme Court in discussing this question in *Jackson* v. *Warren*, 32 Ill. 340, per Breese, Justice, say, "A *pendente lite* purchaser from a mortgagor is, to all intents and purposes, a party to the decree, for the same proceedings may be had against him that can be had against the mortgagor, if either the mortgagor or purchaser from him who purchased during the pendency of the suit or after the sale of the premises refuse to surrender the possession to the purchaser under the decree, the court, on motion, would have power to make an order that he shall deliver up possession to the purchasers. If it be disobeyed an injunction would issue, and on

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proof of service of the injunction and continued refusal, the purchaser might proceed either by attachment, or by issuing a writ of assistance, 4 Kent's Com., 184, 1 Lomax Digest, 535, title mortgage, *pro hac*, vice the purchaser is a party to the decree. In one sense the whole public is a party to a decree, for that itself is of a public nature, and of record of which all persons are bound to take notice. He, then, who meddles with the property which is the subject of the decree becomes by that act a party to the decree. It cannot be objected that the case is no longer *lis pendens* after a decree and sale and conveyance executed, because the court of chancery is not *functus officio* until the decree is executed by delivery of possession, (Lomax Digest, 534.) It will be seen by an examination of the authorities above cited that it is important at the filing of the bill to make all persons in possession parties, and then in case the possession shall be transferred after the filing of the bill, the doctrine of *lis pendens* is applicable, and such parties subsequently obtaining possession are as effectually bound by the decree as the original defendants.

DYING DECLARATIONS.

It has been insisted that death bed declarations in cases of homicide cannot be given in evidence, because their admission would contravene the 6th article of the amendments to the constitution of the United States, entitling the accused in all criminal prosecutions to be confronted with the witnesses against him. The contrary has been uniformly held by the courts. The courts holding that the declarations *in extremis* of a murdered person, as to the homicide, are admissable in evidence. "The right of a party accused of a crime to meet the witnesses against him face to face is no new principle. It is coeval with the Common Law. Its recognition in the constitution was intended for the two-fold purposes of giving it pre-eminence and permanence. The argument for the exclusion of the testimony proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to him that the

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privilege of an oral and cross-examination are secured. The admission of dying declarations in evidence was never supposed in England to violate the well established principles of the Common Law, that the witnesses against the accused should be examined in his presence, the two rules have co-existed there certainly since the trial of Ely, in 1720, and are considered of equal authority. The constant and uniform practice of all the courts of this country, before and since the revolution, and since the adoption of the Federal Constitution and of the respective State Constitutions, containing a similar provision, has been to receive in evidence *in cases of homicide* declarations properly made *in articulo mortis*. It constitutes one of the exceptions to the rule which rejects *hearsay evidence*. It is founded in the necessity of the case, and for the reason that the sanction under which these declarations are made, in view of impending death and judgment, when the last hope of life is extinct, and when the retributions of eternity are at hand, is of equal solemnity as that of statements made on oath." *Campbell* v. *State*, 11 Geo. 374. Up to the time of Woodstock's case, decided in England in 1789, it was held that the question as to whether the declarations were dying declarations, was a mixed question of law and fact to be determined by the jury, under the law as given them by the court, without a preliminary examination by the court; *Woodcock's* case, Leach's Crown Law 500. Since that period in England, and up to 1852 in this country, it has been held to be the peculiar and exclusive duty of the court to decide whether the decedent made the declaration under the consciousness of inevitable death—upon proof of the condition of mind of the deceased at the time they were made, and if the proof does not satisfy the court beyond a reasonable doubt that they were made in *extremity* and that they are dying declarations within the law, they should not be permitted to go to the jury. Dying declarations are such as are made by the party relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance; when he has despaired of life and looks to death as inevitable and at hand; *Starkey* v. *People*, 17th Ill. 21 and authorities cited. In 1852, 11 Georgia 376 Supra. The

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Supreme Court of that State held that the proper course to be pursued was this: "That a *prima facie* case of the moral consciousness required should be exhibited to the court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received and left for the jury to determine whether the deceased was really under the apprehension of death when the declarations were made which they might infer either from circumstances or the expressions used, placing the facts as to whether or not the declarations were made *in extremis*, on the same footing as any other fact to be proved in the case, and the fact that they were made *in extremis* to be proved under the law to the satisfaction of the jury beyond a reasonable doubt. The declarations, however, being admitted, the whole evidence, including that heard by the court as to the condition of mind of the deceased at the time they were made, should then go to the jury to enable them advisedly, and from all the lights, the facts and circumrtances offered to determine upon the credibility, weight and force of the evidence. The condition and state of mind of the deceased, with all attending circumstances bearing upon the question, are proper for their consideration, and there is no ground upon principle or authority for excluding from their consideration the statements of the deceased as to his apprehension of death, nor of the surrounding circumstances forming the *res-gesta*, and tending to establish the existence or non-existence of that condition of mind which would constitute his statements as to the cause of the injury in law, dying declarations. 1 Greenleaf ev., § 160; 1 Phillips, ev. 238; 2 Starkie's ev. 263; Roscoe's Crim. ev. 34; *Lambert* v. *State*, 23 Miss., 355; *Nelson* v. *State*, 13 Smede & Marshall, 506; *State* v. *Thornley*, 4 Harrington, 562; *Starkey* v. *People*, 17 Ill., 23. In the case of *Starkey* v. *People*, above cited, our Supreme Court in speaking of the rule laid down by the Supreme Court of Georgia cited *supra*, say: "The great caution sanctioned by the books in regard to this kind of evidence would seem to demand a rule of practice uniform, free of all embarrassment and nice distinction, and which in its operation will not deprive the jury of any fact or circumstance tending to enlighten them upon the main point of inquiry—the guilt or innocence of the accused. We are, therefore, inclined to adopt the rule laid down in *Campbell*

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v. *The State of Georgia*, 11 Geo., 353; *The People* v. *Green*, 1 Parker's Cr. R., 11; *The State of Wisconsin* v. *Cameron*, 2 Chandler's R., 172, and substantially recognized in many other cases, that the question of the competency of the alleged dying declaration as evidence, is in the first place to be determined by the court upon a preliminary examination, and the declaration being admitted to the jury, it is for them, upon consideration of the whole evidence, including that heard by the court upon the question of competency, and in determining upon the guilt of the accused to take into consideration the state of mind of the deceased as to his apprehension of death and finally determine this, and consequently the force of the declaration as any other question of fact under the law as given them by the court." The proper practice is, that during the hearing of the evidence upon the preliminary examination as to the state of mind of the deceased involving the admissibility of his declaration as to the injury, is to send the jury out in charge of a sworn officer, and if the court determines to admit the evidence then allow the witness to repeat the same in presence of the jury. *Hill's case*, 2 Grattan, 611; *Smith* v. *State*, 9 Hump., 17; *Starkey* v. *People*, 17th Ill., 25. The jury are to consider the evidence and give the same such weight as to them the circumstance warrant, taking into consideration all the facts and the condition of the mind of deceased when made. *Murphy* v. *People*, 37 Ill., 447.

STATE EXEMPTION LAWS.

The leading case upon this question is the case of *Gunn* v. *Barry*, and was decided by the Supreme Court of the United States, and reported in 15 Wallace, 610, and was a case in error to the Supreme Court of Georgia.

By a statute of Georgia, passed many years ago, it was enacted that certain property belonging to the debtor who was the head of a family should be exempt from levy and sale. The exemption included fifty acres of land, and five acres in addition for each child under the age of sixteen years, the land to include the

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dwelling house, if the same and the improvements should not exceed two hundred dollars, and certain articles of personal property. In May, 1866, after the rebellion, and before the State was restored to her proper relation to the general government, Gunn obtained a judgment in one of the courts of the State for $402.30 principal, and $129.60 interest, (in all $531.90) against a certain Hart, who had at the time two hundred and seventy-two and one-half acres of land, worth $1,300, and the judgment bound it as a lien. Hart had no other land, except one tract worth about $100. In 1867 the Reconstruction Act was passed by Congress and became a law. In pursuance of what was contemplated in this act, and the amendments to it, the people of Georgia made a constitution. This constitution, by the first section of its seventh article, ordained that "each head of a family, or guardian, or trustee of a family of minor children shall be entitled to a homestead of realty to the value of $2,000 in specie, and personal property of the value of $1,000 in specie, to be valued when they are set apart." It went on further to declare, "And no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree or execution against said property so set apart, including such improvements as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon." This constitution was with certain exceptions ratified by Congress. The constitution of the State being thus approved by Congress, the legislature of the State, on the 3d of Oct., 1868, passed "An act to provide for setting apart a homestead of realty and personalty, and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families as required by section first of article seventh of the constitution, and for other purposes. The language of this act was the same as the provision of the constitution. Under this act all the land of Hart, which was worth about $1,400, was set apart to him and his family as a homestead. On the requirement by Gunn to the sheriff of the county, one Barry, that he should levy on the lands of Hart, refused to do so, on the ground that they had been set off to Hart and his family

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under the act of 1868, and on a petition for mandamus against Barry to compel him to make the levy, the courts of Georgia, including the Supreme Court, having decreed that the refusal was right, the case was taken to the Supreme Court of the United States. The court, per Swayne, J., say, "Section 10 of article 1 of the constitution of the United States declares that 'no State shall pass any law impairing the obligations of contracts.'"

If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood, when the judgment was recovered, it is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact, and we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court. * * * The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the provision of the constitution, or the legislative act of a State fall within the category last mentioned, they are to that extent utterly void. They are for all the purposes of the contract, which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category and are therefore void." The obligation of a contract between the parties is to perform the promises and undertakings therein contained, and the right to damages for a breach thereof to bring suit and obtain a judgment, to sue out execution until the same is satisfied, pursuant to existing laws. The laws giving these rights are as binding on the parties, and as much a part of the contract as if they had been set forth in its stipulations, in the very words of the law relating to

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judgments and executions, *McCracken* v. *Hayward*, 15 Curtis, 232; *Gaully, lessee*, v. *Ewing*, 15 Curtis, 613; 22 Gratton, 266. It is also well settled that the law which subsists at the time and place of making a contract, and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge or enforcement. *Von Hoffman* v. *City of Quincy*, 4 Wallace, 550. The legal remedies for the enforcement of a contract is a part of the contract itself. A State may change them provided the change involves no impairment of a substantial right, 5 McLean, 575. And whenever such laws are made to act upon past transactions they cannot fail to work injustice; they take property, which in honesty and fair dealing, belongs to the creditor, and without his consent exempts the same from liability for the payment of his debt. *Quackenbush* v. *Danks*, 1 Denio, 130, S. C., 3 Denio, 594; see also 4 Green, 395. If the property is subject to the creditor's remedy when the debt is contracted, it cannot be constitutionally excepted from that liability by subsequent legislation. This question recently came before the Supreme Court of Mississippi, in the case of *Lisby* v. *Plupp*, reported in A. L. Register, April, 1874, at page 239, the court say, "We think the rules deducible from the cases may be reduced to these *formulæ*. The obligation of a contract is the duty of performance according to its terms, the means of enforcement being a part of the obligation which the States cannot by legislation impair. The same question has been recently decided by the Supreme Court of South Carolina, in the case of *Cochran* v. *Darcy*, decided in 1874, the same doctrine was fully maintained. Chicago Legal News, vol. 6, p. 230. In this case the court, per Moses, C. J., say, "It is true, as submitted by the respondent, that in *Gunn* v. *Barry*, the question directly made was as to the effect of a homestead exemption on a judgment obtained before its allowance by the constitution, and act of the general assembly of the State of Georgia, still it is so apparent, that in view of the court, the retrospective operation of such provision against all previous contracts was void, because in violation of the tenth section of the first article of the constitution of the United States, which declares, "that no State shall pass any law impairing the obligation of contracts,"

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that we feel bound to regard the opinion as expressive of the views of the court to the full extent to which the reasons, which it assigns, may carry it. A respect to the duty which we owe to the highest tribunal of the country, as well as to ourselves, requires that we should not only give to the decision all proper effect in the case as presented by the facts, but that we should accept the argument of the opinion, as it affects the general question involved in its judgment. We yield a ready assent to what Mr. Justice Grier says, in *Cook* v. *Moffat*, *et als*, 5 Howard, 308: "The constitution of the United States is the supreme law of the land, and binds every forum whether it derives its authority from a State or from the United States. When this court has declared State legislation to be in conflict with the constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision." The municipal law enters into and forms apart of this obligation, and to that, parties must be considered as referring in order to enforce performance." Accepting the decisions of the Supreme Court of the United States as conclusive authority upon constitutional questions, and the adjudications of that court having uniformly been, that increased exemptions, so far as prior creditors are concerned, is in violation of the constitution of the United States, the courts of the several States are bound to hold that all substantial enlargements of the exemption laws as to prior creditors are void. The rule es tablished in *Gunn* v. *Barry*, will give stability and uniformity to the business and industries of the people, and inculcate a sterner morality to respect the inviolability of contracts. It is essential to the protection of the national jurisdiction, and to prevent collision between State and National authority, that the final decision upon all questions arising upon the constitution of the United States should rest with the Supreme Court of the United States, and finally to determine all suits where is drawn in question the validity of the statute of any State on the ground of its being repugnant to the constitution of the United States, and the decision of the State court of last resort is in favor of their validity. And when the question is decided by the Supreme Court of the United States, the State courts of the several States are bound by such decision, and have no right to overrule the same, and the jurisdiction of the Supreme Court of the United States in cases arising un-

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der the exemption laws of the several States having been affirmed in the case of *Gunn* v. *Barry*, above cited, I regard the question as settled in this country.

Supreme Court of Iowa.

SIMMONS *v.* HERVEY *et rex.*—(19 Iowa, 273.)

1. *Husband and Wife Mortgage.*—It is settled in this State, that by an instrument *duly executed*, the wife may mortgage her separate property to secure her own or her husband's debt.

2. *Conveyance Acknowledgment.*—Prior to the taking effect of the code of 1851, the acknowledgment of the wife was essential to a valid conveyance of her own property, but under the code of 1851 and the act of March 8th, 1858, (Rev. 1860, § 2255,) the conveyance of a married woman has had the same effect as a conveyance by a *feme sole*, or by a man, an acknowledgment being necessary to its admission to record as constructive notice to third persons, but not essential to its validity as between the parties. *Westfall* v. *Lee*, 17 Iowa, 12; *McHenry* v. *Day*, 13 Id., 445, distinguished from this, in this, that they were on instruments of date prior to the act of March 8th, 1858.

3. *Deed, Execution and Delivery.*—Under our statute, as at common law, a grantor, a grantee and a thing to be granted, must all be described in a deed, and an instrument in which any of these are omitted is not legally executed, and can convey no title. Where the wife signed with her husband a blank mortgage, which was delivered to the husband, who inserted therein a description of real estate owned by the wife, and then delivered the paper to a third party with instructions to negotiate it and insert the name of the mortgagee when negotiated, it was held that the instrument was not the deed of the wife.

4. *Parol Authority to Fill Blank.*—The power to fill a blank in a conveyance of land otherwise duly executed under a parol authority, not being presented as a question, the decision of which is essential to a decision in this case it is not conclusively denied; but DILLON, J., is of opinion that it is the simpler, better, and safer doctrine to deny even this power, and the validity as between the parties to a conveyance thus executed, unless it has been subsequently redelivered, or at least confirmed, ratified or adopted by the grantor. This case is entirely different from *McHenry* v. *Day*, 13 Iowa, 445, and *Baldwin* v. *Snowden*, 11 Ohio, 203.

The plaintiff brings this action to foreclose a mortgage purporting to be executed by them. The court below rendered a decree of foreclosure as prayed, against both defendants, who appeal and seek its reversal.

Finch, Clark & Rice for the appellants. Phillips & Phillips for the appellee.

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DILLON, J.—The case was under the statute tried to a jury as a law action, and must be so treated on this appeal. It is to be regretted that there were no issues submitted to determine the questions of fact whether Mrs. Hervey ever acknowledged the mortgage, nor were the questions submitted by counsel framed with that precision which is desirable. Thus for example, the first one assumes the "execution and delivery" of the mortgage "by the defendants," whereas, Mrs. Hervey's defense is based upon the theory that she never *executed* (in the proper sense of that word) the instrument at all, or delivered the same to the plaintiff, or any person for him. But we must take the case as it is, and it brings into view several very important questions.

The lot described in the mortgage was found by the jury to be the *separate property of Mrs. Hervey*, and such in the consideration of this appeal must be taken to be the fact. Then the general question which is presented is, *what in this State is requisite to constitute a valid conveyance or mortgage by a woman, of her separate real property?* It is settled in this State that by an instrument *duly executed*, she may mortgage her property to secure her own or her husband's debt. *Patton* v. *Kinsman*, 17 Iowa, 428; *Jones* v. *Crosthwaite*, 17 Id., 393; *Stone* v. *Montgomery*, 35 Miss., 83. But here the immediate inquiry is, what constitutes such due execution? This requires an examination of the statutes of the State, and intelligently to understand them, they must be viewed in the light of the common law and the previous statutes.

It is well known that a *feme covert* could not at common law during coverture release her right of dower, or convey her own land by any *direct* mode of alienation. Distrust and jealousy of the marital power of the husband are supposed to be the foundation of this doctrine. Such a restraint on alienation could not in the nature of things be endured. And the common lawyers with that fondness for subtilty which at an early period distinguished them, invented or resorted to the intricate, ingenious, cumbersome and expressive machinery of fines and common recoveries, by which indirect modes, and by these only, could a wife's interest in her husband's or her own real estate be aliened; the conveyance by fines was early regulated by statute, (18 Edward 1,) in which proceeding the wife was a necessary party, and the statute required a privy examina-

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tion in order to transfer or assure her estate to the cognizee or purchaser. Blackstone (2 Com., 355) maintains that she is barred by a fine, "because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by the husband."

On the contrary, Mr. Hargrave (Harg. Co. Litt., 121 n.) contends that it is the *judicial proceedings,* and not the privy examination, that gives the fine its binding and conclusive effect. It is only material for our present purpose to note that the privy examination was necessary, because *required by statute.* See on the foregoing, *Kerns* v. *Peeler*, 4 Jones (Law) N. Car., 226–229, (1856); *Green* v. *Branton*, 1 Dev. Eq., 504–507, (1830), per Ruffin, C. J.; *Jackson* v. *Gilchrist*, 15 Johns, 89; *Constantine* v. *Van Winkle*, 6 Hill, N. Y., 177., 1843, S. C. 10 N. Y., 422; *Martin* v. *Dwelly*, 6 Wend., 9–22, 1830, 1 Am. Jur., 73–74. But fines and recoveries were, it is believed, never adopted in this country; 2 Washb. Real Prop., 559, p. 17, and authorities cited. And certain it is that these modes of assurance never prevailed in this State. Thus by the ordinance of 1787, (Rev. § 928,) subsequently extended over Iowa, (Rev., pp. 947–952,) *O'Farrell* v. *Simplot*, 4 Iowa, 381, 1857, it was provided, that until changed by statute "real estate may be conveyed by lease and re-lease or bargain and sale, signed, sealed and delivered, by the person being of full age *in whom the estate* may be, and attested by two witnesses * * * provided such conveyance be acknowledged, or the execution be duly proved, and be recorded within one year." This would clearly allow *femes covert* to convey their real estate by pursuing this course.

The earliest act on the subject, Jan. 4th, 1840, (Laws 1840, chap. 28, p. 35, provided (§ 20) that "a married woman may relinquish her *dower* in any real estate of her husband by any conveyance thereof, executed by herself and husband, and acknowledged and certified in the manner hereinafter prescribed." This was literally reenacted Feb. 16, 1843, Blue Book, p. 207, § 20. By the same act (act 1840, § 24–26, *et seq.*) it was provided that "a married woman may convey any of *her real estate* by any conveyance thereof, executed by herself and husband and acknowledged by such married woman, and certified in the manner hereinafter

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prescribed," viz., by a separate examination and acknowledgment; and this was also literally reenacted Feb. 16, 1843, Blue Book, 207, § 24. And such, without quoting, was the provision of the act of Jan. 2, 1846, (Laws 1846, p. 4,) the earliest married women's protective act in Iowa. These statutes were framed, as will be observed, in analogy to conveyances by fine, that is, the wife must be a party and be privily examined, and acknowledge the instrument. This is the American mode of assurance in place of fines and recoveries. And the rule is general in this country that married women can only convey in the manner and form provided by statute, and may make valid assurances by pursuing the statutory mode whatever it may be. See, in illustration, *Green* v. *Branton*, 1 Dev. Eq., 504–507, 1830; *Johns* v. *Rearden*, 11 Md., 465, 1857; *Needles* v. *Needles*, 7 Ohio, 432, 1857; *Dalton* v. *Murphy*, 30 Miss., 59; *Howell* v. *Ashmore*, N. J., 261; *Mariner* v. *Saunders*, 5 Gill, (Ill.) 113–125, 1848; *Gill* v. *Fauntleroy*, 8 B. Mon., 177, 1847; *Elliott* v. *Pearsol*, 1 Pet., 328, 1825; *West* v. *West*, 10 Serg. & Rawle, 445, 1823; *Price* v. *Hart*, 29 Mo., 171, 1859; *McDaniel* v. *Grace*, 15 Ark., 478, approved 20 Id., 508, 1859; *O'Ferral* v. *Simplot*, 4 Iowa, 481, 1857; *Blake* v. *Blake*, 7 Iowa, 46; *Grapengether* v. *Ferjervary*, 9 Id., 166–173, 1859, 13 Id., 157.

Therefore, if an acknowledgment is not required by statute or usage, a deed by a married woman is good though not acknowledged; *Constantine* v. *Van Winkle*, 6 Hill, N. Y., 177, 1843; reversing same case, 2 Hill, 240; re-affirmed, 10 N.Y.,(6 Seld.) 422, 1853, by the Court of Appeals. And a separate examination is not necessary in all of the States, 1 Am. Jur., 73; *Catlin* v. *Ware*, 9 Mass., 218, 13 Id., 223, 2 Washb., 539, p. 17. It is thus seen that in Iowa down to 1851, when the code took effect, a married woman could release dower, or convey her land by a voluntary deed "executed by herself and husband," to the validity of which, however, a privy examination and acknowledgment were by statute expressly made necessary. We are now ready to inquire into the changes made by code of 1851. Many portions of the prior acts were incorporated into the code, but the framers omitted these sections of the Blue Book above quoted, Blue Book, 207, §§ 20, 24, which specifically pointed out how a married woman might release

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dower or convey her separate estate. And the code of 1851 provides in express terms no *specific* mode in which the dower right of the wife can be released or conveyed. There is no provision requiring any separate acknowledgment. No such is contemplated. Code, § 1219 *et seq.* And there is no provision requiring any acknowledgment at all in order to make the deed valid between the parties.

In the place of the provisions of the former law, the Code of 1851 (§ 1207) provided broadly that "*A married woman may convey her interest in real estate in the same manner as other persons.*" This section accomplishes two things, 1st. It removes her common law disability to convey; and, 2d. It points out the *mode* of conveyance, the same mode as if she were *sole* owner, or as if the owner were a man. And the same policy is further carried out by the act of March 8th, 1858, (Rev., 397, § 2255,) which declares that "the *joining* of the wife with her husband in a conveyance of real estate passes any and all right of the wife," whether it be dower or fee. And no acknowledgment, separate or otherwise by the wife, is provided for or declared to be necessary in order to give the instrument this effect.

Under our law an acknowledgment is not necessary to the validity of a deed or mortgage between the parties, *Gould* v. *Woodward*, 4 G. Greene, 82; *Blain* v. *Stewart*, 2 Iowa, 378, Rev. § 2221.

Our statutes, since 1851, no longer require a privy acknowledgment of the wife, and hence no such acknowledgment is necessary. And since conveyances by married women are, by statute, (Code 1851, § 1207; Rev. §§ 2215, 2255,) put upon the same footing as those by men, or *feme sole*, it follows that no acknowledgment at all by a married woman is requisite to a valid execution of a deed releasing her dower or conveying her real estate. The only effect of the want of such acknowledgment is, that it will not, when recorded, impart constructive notice of its existence, Rev. § 2221, (see this subject discussed by Wright, Ch. J., in *Morris* v. *Sargent*, 18 Iowa, 90, but not determined; and see *Westfall* v. *Lee*, 7 Iowa, 12, and *McHenry* v. *Day*, 13 Iowa, 445, in which the observations respecting the acknowledgment, if to be understood as deeming it essential to the validity of the deed, are in-

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consistent with the view above expressed. These decisions were on instruments of date prior to the act of March 8, 1858.) It follows that although Mrs. Hervey may not, (as she alleges, and as the evidence tends strongly to show,) ever have acknowledged the mortgage in suit, still the want of acknowledgment alone, if the mortgage were otherwise valid and duly executedand delivered, would be no defence to the foreclosure proceeding of the plaintiff. And this brings us to the next question, which is, *was the mortgage, as respects Mrs. Hervey, duly executed and delivered?* This involves the inquiry, *what, under our statute, are the essential requisites of a valid conveyance?* How far has the statute in this respect changed the common law? The requisites of a good deed at common law are clearly and correctly stated in Sheppard's Touchstone of Common Assurances. It is there (54, 55), laid down, that "Every well made deed must be written, *i. e*, the agreement must be *all written*, [*or written and printed*], *before the sealing and delivery of it;* for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal commandment [verbally or by writing, without seal,] that an obligation or other matter, shall be written in it, and this be done accordingly, yet this is no good deed. The same work, the Touchstone, thus enumerates besides writing, the other requisites of a good deed at common law.

"2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that, *all these be set down by sufficient names*, (Id. 54)." And if the name of the grantee be not contained in the premises, yet if it be in the *habendum*, it may be good enough, (Id. p. 75). If made to a person disabled or incapable of taking, it is void, (Id. 55).

"3. Reading, i. e. if required,"

"4. *Sealing*, i. e. that a deed, *so* written be sealed by the party, or by some other of his appointment, (Id. 54), before the delivery of it." (Id. 57).

"5. *Delivery*, i. e. that the deed *so written* and *sealed* be delivered by the party, or some other of his appointment as his deed (Id. 54) to the party to whom it is made or to any other, by sufficient authority from him. (Id. 57). A deed takes effect by delivery, but if delivered before it be sealed, it is nothing worth, (Id.

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58). See also as to the requisites of deeds, *Garrett* v. *Same*, 7 Mowr. 545-47, 1828; *Chiles* v. *Comley*, 2 Dana, 21-23; *Ingram* v. *Little*, 14 Geo., 173; *McKee* v. *Hicks*, 2 Dev. 379, 1833; *Wiggins* v. *Lusk*, 12 Ill., 132, 4 Kent's Com. 462; *Swails* v. *Bustart*, 2 Head, (Tenn.) 561, 1859. *Chauncey* v. *Arnold and wife*, 24 N. Y., 330, and other cases cited *infra*.

Under these authorities it is clear that the mortgage in question, having been filled up in the absence of Mrs. Hervey, without any writing under seal, or, indeed, any writing at all, it would not, at common law, be a good conveyance; certainly not, unless subsequently re-delivered or otherwise adopted or ratified. It must be admitted that much of the doctrine, as laid down in the Touchstone, is owing to, or largely influenced, by the technical rules of the common law, respecting *sealed* instruments. By our statute, Rev. ch, 76), the use of private seals in written contracts is abolished," &c.

This chapter refers to *contracts* alone, and we pass it by, as now immaterial, without stopping to consider whether, or how far it was intended to elevate unsealed, or to degrade sealed instruments. But by section 29, clause 20, it is provided that, "*The word 'deed' is applied to an instrument conveying lands, but does not imply a sealed instrument*, and under it we have decided that a seal is not essential to the validity of a conveyance, (*Pierson* v. *Armstrong*, 1 Iowa, 282, 1855,) though formerly it was so. *Switzer* v. *Knapps*, 10 Id. 72. The English doctrine is, that a deed or sealed instrument must be wholly written and perfected in all its essential and material parts before delivery. This, as we have shown, is the doctrine laid down by the Touchstone, and is the modern doctrine as declared in the thoroughly considered case of *Hibble White* v. *McMornie*, 6 Mees & Wels., 200, 1840, which expressly overruled, *Texira* v. *Evans*. This case (*Texira* v. *Evans*,) as it occupies so conspicuous a figure in the discussions on this subject deserves to be stated.

It is not reported, but is referred to by Wilson, J., 1 Anst. 225-229, (33 Geo., III), and thus stated by him. I remember the case of *Texira* v. *Evans*, before Lord Mansfield, which was this: Evans wanted to borrow £400, or so much of it as his credit should be able to raise; for this purpose he executed a *bond, with blanks*

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for the name and sum, and sent an agent to raise money on the bond. Texira lent £200 on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed,—in other words, held that blanks in a sealed instrument of this character might be filled by parol authority. This is overruled in England, on the technical ground that the agent ought to have been appointed under seal. Under our statute (Rev. ch. 76), there is no doubt that *Texira* v. *Evans* would be good and sound law, in a like case, or a case not involving the conveyance of real estate. In this country the cases are in conflict. As supporting *Texira* v. *Evans*, see *Wooley* v. *Constant*, (bill of sale,) 4 Johns 54, 1809, *ex parte Kerwin*, (appeal bond,) 8 Cow, 118, 1828, 6 Id. 60, *Bank of Buffalo* v. *Kortright*, (transfer of stock in blank) 22 Wend. 348, 365, 1839; and see *Chauncey* v. *Arnold*, 24 N. Y. 330, 1862, which is latest N. Y. case, and reviews the previous ones, *Wiley* v. *Moore*, 17 Serg. and R. 438, 1828, (blank bond), *Boardman* v. *Gore*, 1 Stew. (Ala.), 517, 1828, (blank payee inserted), *Richmond Manufacturing Company* v. *Davis*, (payee's name and amount inserted in sealed bill), 7 Blackf. 412, 1845, Redfield on Railways, 48, § 35, disapproves of the case overruling *Texira* v. *Evans*, and the same case is also disapproved, and the contrary ruled as to the transfer of the blank certificates of stock, by the Supreme Court of Connecticut in *The Bank* v. *R. R. Co.*, 1 Am. Law Reg. (N. S.) 210, 1861; *Speake* v. *United States*, 9 Cranch, 28, 1815, explained and commented on by CH. J. MARSHALL, 2 Brock, 64, 72, 1822; *Gourdin* v. *Commander*, (bond obligee blank and filled in), 6 Rich. 497, 1852; *Duncan* v. *Hodges*, 4 McCord, S. C. 239, 1827, (deed for land with blank); NELSON, J. *Drury* v. *Foster*, 2 Wall 24, 1864. Against *Texira* v. *Evans*, directly or in effect see *Boyd* v. *Boyd*, (blank attachment bond), 2 Nott & McC. 125, 1819; *Gilbert* v. *Anthony*, (prison bond); 1 Geo. 69, 1821, 2 Id. 149, 1 Head, (Tenn) 98; *Byers* v. *McClanahan*, (bond for money), 6 Gill & J., 250, 1834; *Ayres* v. *Harness*, (bond for money), 1 Ohio, 368, 1824; *United States* v. *Nelson*, (official bond blank filled up), 2 Brock, 64, 122; *People* v. *Organ*, (official bond filled up without *express* authority), 27 Ill. 27, 1861; *In-*

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gram v. *Little*, (deed for land), 14 Geo. 173, 1853; *Davenport* v. *Sleight*, 2 Dev. & Batt. 381, 1837; approved *Kine* v. *Brooks*, (bond) 9 Ind. N. C. 218; *Cross* v. *State Bank*, (bond for money), 5 Pike, (Ark.), 525, 1844; *McMurty* v. *Frank*, (bond for money), 4 Monr. (Ky.) 39, 1826; *Arrington* v. *Benton*, (bond for money), 19 Ala. 114, 1831; *Curns and Wife* v. *Lynde*, (blank deed for land held void), 6 Allen, Mass., 305, 1863, distinctly overruling *Texira & Evans*, *Drury* v. *Foster*, (mortgagee's name and the amount blank held void), 2 Wall, (U. S. Rep.) 24, 1864.

An examination of these cases will show that they all, or substantially all, hold that if a specialty be required by law, it cannot be signed and sealed in blank, and afterwards be *wholly* filled up by parol authority, and if this be done, in the absence of the party, so signing and sealing, it is not his deed, unless subsequently re-delivered, acknowledged or adopted.

But one class of the cases hold that if only certain blanks are left, these may, according to *Texira* v. *Evans*, be filled up in the absence of the obligor, pursuant to parol authority from him. But the class of cases which deny *Texira* v. *Evans*, hold *otherwise*.

But we have found no case which adjudges that deeds or conveyances of *lands* may be signed in blank, and be wholly filled up and delivered in the absence of the grantor, by virtue of parol authority, and yet be binding upon him without a subsequent adoption, confirmation or re-delivery by him. Conveyances of land in this State must be *in writing*, and have the grantor's name affixed to the same, Rev. ch. 96, §§ 2220, 2227.

Authority to sell land may be conferred by parol, but authority to convey or complete a conveyance must be conferred by writing, 2 Kent Com. 614, *Tappan* v. *Redfield*, 1 Halst. ch. 339, 1846, and authorities cited; *Smith* v. *Dickerson*, 6 Humph. 261, 1845; *Riley* v. *Minor*, 29 Mo., 439, 1860; *Elliott* v. *Pierce*, 20 Ark., 508, 1859; *Worral* v. *Meum*, 1 Seld., (N. Y.), 229.

A deed signed in blank is not, in the sense of the law, executed. There must still be under our statute, as at common law, a grantor, a grantee, and a thing to be granted, and these must all be described in the writing. As to essentialness of grantee being named or designated, see Bac. Abr., Grant C, and common law

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authorities cited; also *Garnett* v. *Garnett's* lessee, 7 Monr., (Ky.), 545; *Iwin* v. *Longworth*, 20 Ohio, 581, 602, 1851; *Chiles* v. *Conley's heirs*, 2 Dana, (Ky.), 21, 1834, 4 Kent Com. 462; *Phelps* v. *Call*, 262, 1847; *Wiggins* v. *Lusk*, 12 Ill. 132; *Chauncey* v. *Arnold*, *infra*; *Fletcher* v. *Mansur*, (christian name of husband as grantee left blank, he inserted his wife's name, held that title was in the husband, there having been no delivery to the wife), 5 Port. (Ind.), 267, 1859; *Drury* v. *Foster*, 2 Wall, U. S. Rep. 20, 1864.

Sealing is dispensed with by the statute (§ 29, clause 20 supra) as one of the requisites of a conveyance of lands, and this was because with us seals had become a mere useless form without significance. But the other essential common law requisites of conveyance of land are not thereby abrogated, and regularly, a deed should still, as heretofore, be perfect before delivery, as it takes effect from that time. See authorities above; also *McKee* v. *Hicks*, 2 Dev. 379, 1833, approved 2 Dev. and Batt (Law) 381, *Brevard* v. *Neeley*, 2 Sneed, (Tenn) 164, 1854. The majority of those cases above cited, which hold that blanks in sealed instruments may be filled up by parol authority, relate to bonds for money, or official bonds or instruments of a commercial nature, such as stock certificates and the like. The doctrine has not been relaxed so as to extend to grants of land, Story Agency, § 48, and cases *infra*. No person "says Ruffin, Ch. J., *arguendo*, in *Davenport* v. *Sleight*, 2 Dev. and Batt. (Law) 381, 383, 1837, "will argue in favor of a deed of conveyance in which the name of the bargainee for instance, or the description of the land was inserted after execution by the vendor and in his absence, although done without corruption or by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol, and requires the more permanent evidence of writing and sealing. In the recent case of *Chauncy* v. *Arnold*, 24 N. Y., 330, 1862, the Court of Appeals decided that the name of a mortgagee should be inserted before delivery, and if not so inserted, the instrument did not become effectual by delivery in such an imperfect state, to one who advanced money upon the agreement, that he should hold the instrument as security for his loan. The question whether the paper might have been made valid and effec-

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tual by proof of parol authority to fill the blanks with the lenders name as mortgagee, was not decided."

DENIO, J. observes: "If we take into consideration only what is written, he paper is wholly without meaning. A transfer to a person not named, or in any way described, or designated, is unconnected with anything else, a mere nullity. To hold the instrument valid, would let in some of the mischief which the authors of the marriage settlement may be supposed to have intended to guard against in requiring a writing under seal to effect a disposition of the property. But although there is some diversity in the cases, I am of the opinion that none of those of modern date countenance the method of creating a title to or a lien upon land which it is sought to uphold in the present case." Cases arising upon bills and notes, are plainly distinguishable. These he admits, if issued in blank may by filled up. But no one he adds would be bold enough to contend that a paper intended to operate as a mortgage could be put in circulation in such a shape, and by filling up could be made obligatory on any one. This doctrine is limited strictly to commercial paper, and is based solely upon its negotiable quality, 24 N. Y., 332, 333, Story Agency, § 48, *Ingram* v. *Little*, 14, Geo. 173, 1853, is to the same effect; also 2 Wash. Real P, 554, pl. 7, in the still more recent case of *Burns and Wife* v. *Lynde*, (6 Allen] Mass.] 305, 1863), it was decided by the Supreme Court of Massachusetts, in a case strikingly like the one before us, that a printed deed signed and sealed in blank by a married woman, the blanks being filled up in *her absence*, but by her parol authority, was ineffectual, unless afterwards redelivered or adopted when in a completed state.

The dangerous nature of any other rule is well enforced in the opinion. And in the still more recent case of *Drury* v. *Foster*, (2 Wall 24, 1864), it was held by the Supreme Court of the United States, that a paper intended as a mortgage, but with *name of mortgagee* and *amount in* blank, when signed and acknowledged by the wife, was void as to her, though the plaintiff was a *bona fide* owner of the instrument.

Duncan v. *Hodges*, (4 McCord, [South Car.] 239), 1827, is the only case we have met which has attempted to extend the doctrine of *Texira* v. *Evans*, to conveyances of real estate.

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In *Duncan* v. *Hodges*, the plaintiff signed and sealed a printed deed of conveyance of a tract of land, which was attested by two witnesses and left by the plantiff with his agent to be filled up, whenever the defendant who had agreed to buy it, should execute a bond for the purchase-money. The defendant being ready to give his bond and accept the deed, the agent filled the blanks conveying the land to the defendant and delivered it to him, who accepted it, and gave his bond for the purchase money. The action was debt on the bond, and the defense was, that the deed was void, neither the grantor nor the subscribing witnesses being present when it was filled up and delivered. It was held that the plaintiff was entitled to recover on the bond. This decision was obviously right upon the ground that the plaintiff by accepting the bond given for the purchase money, suing upon and claiming the benefit of it, adopted, ratified and confirmed the delivery of the deed, or was estopped from denying it. As to subsequent adoption and estoppel, see *Drury* v. *Foster*, 2 Wall, U. S. 24 ; *Parker* v. *Hill*, 8 Metc, 447, 1844, *Hudson* v. *Rivett*, 5 Bing, 368, 1 Greenl. Ev. § 568, A note 6, and cases cited at end of note; *Camden Bank* v. *Hall*, 2 Green N. J., 583, 588, *Van Amruge* v. *Morton*, 4 Whart, (Pa). 382, 387, *McNutt* v. *McMahan*, 1 Head, (Tenn). 98, *Rhode* v. *Louthame*, 8 Black, 413, *Price* v. *Hart*, 29 Mo. 179, *Burns* v. *Lynde*, 6 Allen, 305, 310. But in delivering the opinion, another ground for the decision is taken, and is thus stated by JOHNSON, J.: The general rule is, that if a blank be signed, sealed and delivered, and afterwards written, it is no deed, and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But this rule was never intended to prescribe to the grantor, the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by delivery, and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect, before delivery, it is a good deed. Thus it is said, that if a deed be made with blanks, and afterwards filled up, and delivered by the agent to the party, it is good. Anst. 229, (which is *Texira* v. *Evans*), Com. Dig., Fait A, (1) note (F) Days *Ed.* It is not pretended that

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this deed was not perfect, as to form, when it was delivered by Gray, the plaintiff's agent, or that he was not instructed by the plaintiff to fill up the blanks and deliver it; and according to this authority (*Texira* v. *Evans*), the deed is good. This deed is distinguishable from the one under consideration, there being in ours no specific grantee intended, no express authority from the owner to fill up blanks and deliver to him, and no subsequent adoption of what had been done, by bringing an action on the bond given by the purchase money, and claiming the benefit of the delivery of the deed.

We cannot upon principle or authority, uphold the validity of a "floating" deed or mortgage of land, that is an instrument intended to circulate or float in commercial or business channels after it has parted from the possession of the grantor, and when it finds an owner have his name inserted in the absence of the grantor, without authority in writing 6 M. & W. 200. Such an instrument is not valid *proprio vigore* as a conveyance or charge on lands though it or the transaction may in certain cases give equitable right, *Switzer* v. *Knapps*, 10 Iowa, 72.

We need not, in this case, conclusively deny that power to fill a material blank in a conveyance otherwise duly executed, might be conferred by parol, but the simpler and better, or safer doctrine in the writers opinion is, to deny even this power and the validity as between the parties of a conveyance thus executed, unless it has been subsequently redelivered, or at least confirmed, ratified or adopted by the grantor. But admitting that certain blanks may, before delivery, be filled by parol authority from the owner, still the present decree must be reversed.

The property was the wife's, at least it is so to be regarded on this appeal. She signed wholly in blank. She was not present when the paper was filled up. She is not shown to have received, enjoyed and retained any of the benefits arising from its negotiation, or otherwise to have ratified and consented to the act of filling up and negotiating. She is in no manner equitably estopped to make the defense that the conveyance is not valid, *Drury* v. *Foster supra*. It was filled up by Mr. Hervey, in her absence, and without her knowledge, with the description of the lot, *and there is no finding that she authorized verbally or otherwise, this to be*

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done. It was filled up with the name of the grantee, and the description of the note by Smith, or under his order, when in Nebraska ; and Smith does not pretend that he had any authority, verbal or otherwise from *Mrs. Hervey* to do so. On the contrary he swears that he supposed the property was Mr. Hervey's, and that he acted, in filling the blanks, under the husband's verbal authority and instructions. The law of course, confers upon the husband no such power over the property of his wife. The penalty of his misuse of her signature cannot, *certainly as between the parties to the instrument* be the loss of her property.

The case is distinguishable, and entirely different from *McHenry* v. *Day*, (13 Iowa, 445), and *Baldawin* v. *Snowden*, (11 Ohio, 203). We only observe that very different equitable consideration would apply, if the property were or shall be found to be the husband's, and that he has received the benefits of the negotiation of the mortgage to the plaintiff or otherwise adopted it.

Decree reversed and trial *de novo* ordered.

The foregoing opinion will be found of interest to the profession in this State, particularly from the manner in which the subjects are discussed by the learned judge and from its practical importance and its application to our statute cited in this note, upon the first point in this case, that a married woman may voluntarily convey her separate property by deed of trust or mortgage, to secure the debt of her husband, is fully sustained in this State in the case of *Young* v. *Graff*, 28 Ill., 20.

The second question involves the inquiry, what under our statutes are the essential requisites of a conveyance of the separate property of a married woman. That the above opinion is good law in this State, will clearly appear by an examination of our statute. The 17th section of the conveyance act of 1845, (Rev. Stat. 1845, p. 106), provides that, "When any husband and wife residing in this State shall wish to convey the real estate of the wife, it shall, and may be lawful for the said husband and wife, she being above the age of eighteen years, to execute any grant, bargain, sale, lease, release, feoffment, deed, conveyance or assurance in law whatsoever, for the conveying of such lands, tenements and hereditaments; and if after the executing thereof, such wife shall appear before some judge, or other officer authorized by this chapter, to take the acknowledgments to whom she is known, or proved by a credible witness, to be the person who executed such deed or conveyance, such judge, or other officer shall make her acquainted with, and explain to her the contents of such deed or conveyance, and examine her separate and apart from her husband, whether she executed the same voluntarily, freely and without compulsion of her said husband, and if such woman shall upon such examination acknowledge such deed or conveyance to be her act and deed, that she executed the same voluntarily and freely, and without compulsion of her husband,

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and does not wish to retract, the said judge or other officer, shall make a certificate indorsed on, or annexed to such deed or conveyance, stating that such woman was personally known to the said judge or other officer, or proved by a witness (naming him) to be the person who subscribed such deed or conveyance, and setting forth the examination and acknowledgment aforesaid, and that the contents were made known and explained to her, and such deed (being acknowledged or proved according to law, as to the husband), shall be as effectual in law as if executed by such woman while sole and unmarried. No covenant or warranty, contained in any such deed or conveyance, shall in any manner bind or affect such married woman, or her heirs further than to convey from her and her heirs effectually her right and interest expressed, to be granted or conveyed in such deed or conveyance." This section of the statute remained in force up to March 27th, 1869, at which time the following act was passed which provided, "that any *femme covert* being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney or other writing of, or relating to the sale, conveyance, or other disposition of lands or real estate, as aforesaid, shall be bound and concluded by the same in respect to her rights, title, claim, interest, or dower in such estate, as if she were sole and of full age as aforesaid, and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writings may be the same as if she were sole." (Laws of 1869, page 359. It is thus seen that in Illinois, down to 1869, when the above act took effect, a married woman could release dower or convey her land by a voluntary deed "executed by herself and husband," to the validity of which however a privy examination were by statute expressly made requisite, which specifically pointed out how a married woman might release dower, or convey her seperate estate, and the act of 1869 provides in express terms that, the acknowledgement or proof of the execution may be the same as if she were sole and unmarried. This act was substantially re-enacted by the conveyance act of 1872, laws of 1872, page 287, in force July 1st, 1872, as follows:

§ 18. "Any married woman being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writings of, or relating to the sale, conveyance or other disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same in respect to her right, title, claim, or interest in such estate as if she were sole.

§ 19. The acknowledgment or proof of any deed, mortgage, conveyance, release of dower, power of attorney or other writing of, or relating to the sale, conveyance or other disposition of lands or real estate, or any interest therein, by a married woman may be made and certified the same as if she were a *femme sole* and shall have the same effect."

The statutes above cited, accomplish two things. 1st. They remove her common law disability to convey; 2d. They point out the mode of conveyance. The act of 1845, *supra*, required a privy examination and acknowledgment. The act of 1869, *supra*, declares that the wife joining with her husband in the execution of any deed, mortgage, &c., shall be bound and concluded by the same in respect to her right, title, claim, interest or dower in such estate, as if she were sole; and the act of 1872, *supra*, declares that she shall be bound and concluded by the execution of any such deed, or conveyance, (her husband joining in such deed or conveyance, the same as if

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she were a *femme sole*, and shall have the same effect. And no acknowledgment separate or otherwise by the wife is provided for or declared to be necessary in order to give the instrument this effect. Our statute since 1869, no longer requires a privy acknowledgment of the wife, hence, no such acknowledgment is necessary.

The conveyance of married women joining with their husbands, are by the last two statutes, put upon the same footing as those by men or a *femme sole*. It follows that no acknowledgment by a married woman is requisite to a valid execution of a deed releasing her dower or conveying her real estate. The only effect of the want of such acknowledgment it will not be admitted to record. Under our law, an acknowledgment is not necessary to the validity of a deed or mortgage as between the parties.

Semple v. *Miles*, 2 Scam. 315. *McConnell* v. *Reed*, 2 Scam. 371.

Thus it is seen that no acknowledgment is necessary to the validity of a deed or mortgage, as a general rule, but to this rule there are exceptions. Our Homestead Act, Laws of 1873, pp. 99-100, exempts a homestead of the value of $1,000; § 4 provides that "No release, waiver or conveyance of the estate so exempted shall be valid, unless the same is in writing, subscribed by said householder, and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned, or given pursuant to the conveyance; or if the exemption is continued to a child or children without the order of the court directing a release thereof." In other words, in all cases where the statute requires an acknowledgment to the validity of a deed, the statute must be substantially complied with, *Hues* v. *Lane*, 11 Ill., 123; in all other cases the deed is valid as between the parties without acknowledgment, provided, as in cases of married women, the statute repeals the common law disability. In the case of *Burns and Wife* v. *Lynde*, (6 Allen, Mass., 305), it was held that, a married woman, who had signed and sealed a blank form of a deed with parol authority to fill it up, so as to convey her rights of dower and homestead in her husband's land may after the instrument has been so filled up in her absence, and signed and delivered by her husband, maintain a bill in equity to compel the person named therein as grantee to re-convey her estate in the premises, although upon being informed that the instrument had been filled up in conformity to her authority, she assented thereto, and although upon the faith thereof, the person named as grantee had rendered services to her husband, and furnished supplies to her family.

In case of the execution of a deed by a married woman, where the law requires an acknowledgment, that the acknowledgment of a paper in blank, or with a blank for the name of the grantee, or a description of the land would be void. The case of *Drury* v. *Foster*, 2 Wall, 24. The Supreme Court of the United States hold that a paper executed under seal for the husband's benefit by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be afterwards filled up by the husband and given to a lender of money, though one *bona fide* and without knowledge of the mode of execution, was void, and the mortgagee on cross bill to a bill of foreclosure by the lender, was directed to cancel her name. The question of the execution and delivery of deeds in blank has frequently been before the courts, and the authorities are somewhat con-

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flicting. This question recently came before the Supreme Court of California, in the case of *Upton* v. *Archer*, and reported in 41 Cal. 87, the court, per RHODES, C. J., say, "The plaintiff being the owner of the tracts of land described in the complaint, offered to sell the same to two certain persons, and before they had accepted the offer he signed and acknowledged an instrument in the form of a deed, sufficient to convey the lands, except that a blank was left for the insertion of the names of the proposed purchasers as the grantees. He left this instrument with Webster, and gave him verbal directions to fill the blank with the names of the proposed purchasers if they accepted the offer. During the absence of the plaintiff Webster sold the lands to the defendant on the same terms that the plaintiff had offered to sell them to the proposed purchasers from him, caused the name of the defendant to be inserted in the instrument above mentioned, delivered it to the defendant as the plaintiff's deed, and received and still holds the portion of the purchase money which was paid in hand, and the defendant's promissory note, payable to the plaintiff, for the residue of the purchase money. Upon the plaintiff's return he refused to receive from Webster the money or the note. When that instrument was left with Webster by the plaintiff, it was not his deed, for the obvious reason, that there was only one party to it. No one could convert it into his deed, except the plaintiff, himself, or some one by him thereto, duly authorized, and as it could not become the plaintiff's deed until the name of the grantee was inserted, that act could not be performed by an agent in the absence of the plaintiff, unless his authority was in writing (Story on Agency, sec. 49, and notes, Dunlap's Paley on Agency, 157, and notes.) The case comes within the sixth section of the statute of Frauds." See also same case, reported in vol. 10, Am. Reports, p. 266, and authorities cited in note. There are a few cases that hold, more or less directly, that parol authority to the agent is sufficient, see *Field* v. *Stagg*, 52 Mo., 53; *Inhabitants of South Berwick* v. *Huntress*, 53 Me., 89, and cases cited, *Gibbs* v. *Frost*, 4 Ala., N. S. 720; *Bank* v. *Hammond*, 1 Rich. 281; *Gourdin* v. *Commander*, 6 Rich. 497, *Duncan* v. *Hodges*, 4 McC., 239; *Bridgeport Bank* v. *New York & N. H. R. R. Co*; 30 Conn, 231; *Camden Bank* v. *Hall*, 2 Green, 383.

In *Chase* v. *Palmer*, 29 Ill., 306, the court say, "The deed is wanting in one essential, namely, a grantee, and is therefore void." At the close of the opinion, they say that, "It was an objection which might have been removed by proof." It may be that parol authority would have been sufficient under our statute, (Statute Frauds), and the case of *Luke* v. *Campbell*, 18 Ill. 106, to have authorized the agent to have inserted the name of the proper grantee, but I apprehend, under our statute as amended by the act of 1869, requiring the authority of the agent to be in writing, the case in California, above cited, is good law in this State, and is fully sustained by authority.

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Supreme Court of Illinois.

JANUARY TERM, 1872.

JOHN W. GRANTHAM *v.* SAMUEL T. ATKINS.

APPEAL FROM DE WITT.

1. *The act of September 28th, 1850, construed.*—The act of Congress entitled an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits. Approved March 28th, 1850, considered and construed.

2. *Title in fee did not pass by the act.*—Held that title in fee simple did not vest in the States until the issuing of the patent.

3. *Rule of interpretation of statutes.*—It is a settled rule of interpretation that statutes must be so interpreted as to give effect to the whole; and one part must be so construed by another, that the whole may stand.

4. *Acts of Congress of March 2d, 1855, and March 3d, 1857, considered and construed.*—That under the acts of Congress of Sept. 28th, 1850, March 2d, 1855, and March 3d, 1857, vacant and unappropriated land is subject to private entry, the same not having been confirmed to the States.

5. *Patent cannot be attacked collaterally for fraud in ejectment.*—That when such lands are entered, and the patent issued to the purchaser, a third party cannot in ejectment attack it collaterally for fraud.

Moore & Warner, for appellant.

Beason & Blinn, for appellee.

The opinion of the court was delivered by

THORNTON, Justice.—The chief defense to this action of ejectment is that the land, to which the plaintiff had a patent from the United States, was swamp and overflowed land, and as such, and prior to the entry, the title was vested in the State, by force of the act of Congress of September 28th, 1850. Brightey's Digest, 492.

The true construction of the several acts of Congress is, that these lands were subject to purchase, until the law was complied with, and the patent was issued to the State.

The first section of the act of 1850 enacts that the whole of the swamp and overflowed lands shall be and are hereby granted to the States. If there were no other provision it might well be said, that an absolute grant was made.

The second section, however, provides that a list of the lands shall be made by the Secretary of the Interior, and transmitted to the Governor, and on the request of the Governor, a patent shall issue, "and on that patent the fee simple to the said lands shall vest in the State."

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Congress made a grant of lands, and then directed the mode in which it was to be executed, and named the act which should vest the title.

The second section must control the first.

It is a settled rule that statutes must be so interpreted as to give effect to the whole, and one part must be so construed by another that the whole may stand.

If we make an absolute grant by the first section, then we nullify the second. If the intention was that the title should be vested by the first, then the words in the second, "and on that patent the fee simple to said lands shall vest," are useless and inoperative.

The correct conclusion to be drawn from both sections is, that a grant was made, which would vest the title, upon a compliance with the law in making the required list, and the issue of a patent.

This construction is fully sustained by the subsequent legislation of Congress in relation to the same subject matter.

On the 2d of March, 1855, Congress passed a law entitled, "An act for the relief of purchasers and locators of swamp and overflowed lands."

The first section directed the President to issue patents to all purchasers of swamp lands, who had made entries prior to the issue of patents to the States, and reference was made to the act of September 28th, 1850, by its date and title.

The second section directed a return of the purchase money to the State upon proper proof.

Though the title cannot control the plain words in a statute, it is entitled to some consideration.

The title of this act shows that the statute was intended to relieve purchasers of swamp lands. Why should Congress attempt relief, if the United States had parted with the title? Why should it direct the President to issue patents to these same lands to purchasers at private entry, if the title had vested in the States in 1850?

We cannot escape the conclusion, that Congress recognized the swamp and overflowed lands, belonging to the United States, until the issue of the patent to the State.

Again on the 3d of March, 1857, Congress passed another law upon the subject of the swamp lands, and in it referred to the act of 1850. By the act of 1857, the swamp and overflowed lands,

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as granted by the act of 1850, were confirmed to the States, so far as the same shall remain vacant and unappropriated."

If they had been entered or appropriated, then they were not confirmed to the States. Thus in unequivocal language we have a plain recognition of the right of private entry, and of the right of Congress to appropriate.

We are of opinion that there is not a doubt upon which even a plausible argument can be based, that title to the swamp and overflowed lands did not vest in the State, until the issue of the patent. We must therefore recognize, as the best evidence of title, the patent to the purchaser, and not the subsequent patent to the State.

As we hold that the land was subject to entry, and the patent was lawfully issued to the purchaser, a third party cannot in ejectment question its firmness, or attack it collaterally for fraud.

The judgment of the court below is affirmed.

Judgment affirmed.

It was held in the case of the "*Board of Supervisors* v. *State's Attorney, &c.*, 31 Ill. 58, that, by the grant of swamp and overflowed lands, under the provisions of the act of Congress, of September 28th, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, a fee simple estate passed unconditionally, and that the State became the actual owner of the lands, with power to dispose of them in such manner and for such purposes as to the legislature might seem most expedient, and in the case of *Dart* v. *Hercules*, 34 Ill., 395, it was held that under this act the title to the swamp lands vested as fully in the States as if they had been conveyed by patent. It will be observed that the principal case overrules these cases, so far as they hold that the fee title passed by virtue of the act of Sept. 28th, 1850, before the issuing of the patent. In the case of *Foster, et als* v. *Evans*, 51 Mo., p. 48, the same question was involved as in the principal case, and the court say, "The main question here is whether the plaintiffs, themselves, have shown any title. A plaintiff must first show title in himself before he can have any standing to disturb the defendant's possession. The only title relied on was a simple entry of the land with the United States Register and Receiver, upon which no patent has ever been issued, at least none was shown. The evidence shows this was swamp land, and had been selected as such under the act of Congress above referred to. What right had the Register and Receiver to permit an entry of this land after it had thus been granted to the State of Missouri. It is unnecessary to enquire whether this grant to the State conferred a complete title without a patent or not, it is sufficient that it reserved it from sale by ordinary entry with the United States Register and Receiver, (see *Hann. & St. J. R. R. Co.* v. *Smith*, 41 Mo., 310.) The same question was passed upon by the Supreme Court of Arkansas, in the case of *Branch* v. *Mitchell*, 24 Ark., 441. The first enquiry in the case was whether the lands passed to and vested

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in the State as by a grant *in presenti*, by the provisions of the act of Congress, of September 28th, 1850, and the second whether under the laws of the State, Mitchell, if the State had the power or now has the power to convey to him the lands, is entitled to demand a conveyance. The first question requires it first to be determined whether the lands were at the date of the act of Congress, swamp and overflowed, and thereby rendered unfit for cultivation, and the court held that, by the words of the act of Congress of September 28th, 1850, all the lands in the State which were swamp and overflowed, and thereby unfit for cultivation immediately passed to and vested in the State. In the case of *Fletcher, et als*, v. *Pool*, 20 Ark., 102, the same court, in construing the act of 1850, say, "That the act was a *present* grant vesting in the State *prio vigore* from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubt can be entertained, *Rutherford* v. *Green's heirs*, 2 *Wheat.* 196, *opinions of Attorney General Black, of 7th of June*, 1857, *and* 10*th Nov.*, 1858, (*precisely in point*), and authorities *there cited*. The object of the second section was not to postpone the vestiture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries, and to prevent a premature interference with the lands by the State Legislature before they were so designated, so as to avoid mistake and confusion where land is granted by legislative enactment, and the grantee is authorized to demand a patent for the land, his title is as much vested as if he had the patent, which is but evidence of his title." In the case of *Allison* v. *Halfacre*, 11 Iowa, 450, the Supreme Court of Iowa maintain the same doctrine, and the court, per LOWE, C. J., say, "The act granting the swamp lands operates *ex propria vigore* to pass the title at once." This doctrine was re-affirmed by the same court, in *Barrett* v. *Brooks*, 21 Iowa, p. 147, and say, per DILLON, J., "It is plain (for it is so expressly declared), that the fee simple of the swamp lands passed to the State." See also *Dunklin Co.* v. *The Dunklin County Court of Dunklin Co.*, 23 Mo., 456. The Supreme Court of Iowa in discussing the Federal and State legislative history of the swamp land and railroad grants, in *Barrett* v. *Brooks, et als*, 21 Iowa, 144, say, "As the act granting these lands contained no specific directions to the Secretary, as to the means to be employed or the manner in which he should select them. And as the field notes of the surveyor did not contain data sufficiently full to enable him adequately to carry out the rule which the law laid down for their selection, we suppose it was quite competent for the Secretary, through the Commissioner, to adopt the form and mode of selection suggested in the instructions which we have just been considering. Under these the State had the option of adopting one or the other of the two methods, either to make the field notes of the survey the basis of their selection, or to accept the grant upon the basis of a re-survey and examination of the surface of the land, in order to determine with more precision the quantities and boundaries of the swamp and overflowed land, furnishing the requisite satisfactory evidence of the same. The States of Michigan and Wisconsin adopted the former, this State, with others, elected to take the latter course. * * The act of Congress granting these lands made the Secretary of the Interior the executive officer for carrying the same into effect. In December, 1857, it became necessary for him to determine at what period the grant took effect; whether it was at the date of the law, or when the patent issued. In determining this question he

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says, "The granting clause in the first section, namely, the words "*are hereby granted*" seem to him to impart a grant *in presenti*. They confer the right to the land though other proceedings were necessary to perfect the title, Lester's Land Laws, 549. This construction of the act by the Secretary, then A. H. H. Stewart was subsequently confirmed by J. S. Black, Attorney General, in a very clear, and able opinion, addressed to Jacob Thompson, who was the Secretary of the Interior at the time, founded upon certain judicial authorities to which reference was made, Lester, 564. It was also confirmed by Congress, as we have reason to infer from the character and objects of an act passed March 2d, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands." The circumstances giving rise to this act are understood to be these: The lands covered by the grant were not and could not be listed at once, and these could not be withdrawn from market without at the same time withdrawing the whole mass of public lands, and in as much as entries and locators with land warrants of the public domain were made in a large number of instances without examination of the character or quality of the same, and the local officers not having the data in the selections to make the proper discrimination. The result was that a very large amount of the swamp lands were disposed of to private parties by the government at the local land offices. Now the effect of all this, under the foregoing decision of the Secretary of the Interior, that the right of these swamp lands vested in the States at the date of the passage of the law, was to render the title of the private entries and locations exceedingly uncertain, if not altogether ineffectual. Hence it was but natural that those holding lands under such titles should feel dissatisfied with their purchase, and seek some kind of relief at the hands of Congress.

On the other hand, when the State by its agents come to select, and list these lands, it found its rights too largely interfeared with to allow it to pass without protest, and lodged a complaint against these intermeddlers, and insisted upon the priority of her claim under the law. The manner in which Congress adjusted this complaint under the provision of the act, March 1855, shows quite unmistakable, that the construction which Congress entertained of the act, granting the swamp lands was accordant with that of the Secretary of the Interior, and the Attorney General, otherwise upon the hipothises that no right to these lands had vested in this State, Congress could not have felt any necessity of extending the relief granted of validating these private entries, and directing patents to issue thereon, nor on the other hand, granting to the State, the indemnity therein offered, except upon the idea of a previous investure in her of the title and right to these lands.

We have not thus referred to the construction which Congress, the Attorney General, and the Secretary of the Interior have given to this act, (and we are not advised that any other executive officer of the government, at any time, has expressed a contrary opinion), because we feel it necessary to adopt the same opinion in the disposition of these cases.

We expect to place our decision of them on other grounds, and will reserve our opinion as a court, upon the proposition, whether the act grants a present right or not, until the question becomes a vital one in some other case. It may not be out of place however, for the writer of this opinion to suggest that after a more careful examination of the question, he is comfirmed in the opinion expressed on the same subject in the case of *Allison* v. *Holfacre*, (11 Iowa, 450)." The principal case is sustained by the Supreme Court of Wisconsin, in the cases of "*The State ex rel Parson* v. *The Commissioners of the School and University Lands*, 9 Wis. 236, the court say: "Upon an examination of the relations, they fail to show that these lands have ever been patented to the State, or in other words, it does not appear that the State has acquired the legal title to them, and consequently it is difficult to understand what right the State has to dispose of them before it has acquired such a title. For, manifestly the State could convey to the purchaser, no greater title than itself possessed. Now whatever claim in equity the State may have to the swamp and overflowed lands within its limits, by virtue of the provisions of the act of Congress, yet we think it quite obvious that by the terms of that act, the fee simple does not vest in the

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State until the patent issues. It is true the language ot the first section of the act would favor the idea of that, it was the intention of Congress to make a grant which should operate *in presenti*, and vest the title absolutely in the States which were the objects of the grant by the act itself, but still if the second section is examined, it will be seen that provision is made for the issuing of patents for the swamp and overflowed lands, on the request of the Governor of the State, (in which such lands are situated), and it is expressly declared that "*On that patent the fee simple to said lands* shall vest in said States," &c., "subject to the disposal of the legislature thereof." This language shows in the clearest manner that the title to these lands remains in the general government until the patent issues, such being the case, and if no patent has issued for the lands mentioned in the relations in the above cases, we cannot see what right the State has to sell them. That the decision in the principle case, and cases in Wisconsin, are decided correctly upon principle, a simple suggestion will demonstrate. Although the weight of authority, it would seem is the other way. If a fee simple estate passed to the States, to all of the swamp and overflowed lands *in presenti*, as held by some of the cases here cited, I am at loss to understand by what authority Congress by the act of March 2d, 1855, could divest the States of the fee title and invest the purchasers and locators of the lands with the fee title, without the consent of the States. That the States by the act of Sept. 28th, 1850, took an equity in all of the swamp and overflowed lands, cannot be questioned, and was so understood by Congress when the act of 1855 was passed. And as the lands were not withdrawn from the market, and could not be, without withdrawing the entire public domain from the market, is clear, from the reasons given in case of *Barrett* v. *Brooks, et als*, 21 Iowa, 144, above cited, and for the reasons that the States had an equity in the lands mention in the act, congressional legislation gave the States the benefits of the same, which I believe has been accepted by all the States interested. To hold otherwise than is held in the principle case, would be to hold that the fee simple estate of all the lands mentioned in the act of March 2d, 1855, is in the States and not in the purchasers and locators and their grantees, and, by the holding that the fee simple estate passed on the issuing of the patent, the States receive the lands so patented, and the proceed of such as were sold or located, prior to the issuing of the patent, and confirms the title beyond question in the purchasers and locators mentioned in the act of Congress of 1855. The following are the acts of Congress, on which all the cases have been decided, and are appended for the convenience of the profession:

An act to enable the State of Arkansas and other States, to reclaim the "Swamp Lands" within their limits.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled. That to enable the State of Arkansas, to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable of the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Govenor of the State of Arkansas, and, at the request of said Governor, cause a patent to be issued to the State therefor: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation", shall be included in said list and plats; but when the greater part of a subdivisions is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the

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Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

APPROVED, September 28th, 1850.

United States statutes at large, vol. 9, p 519.

An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States, cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrants, or with script, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled, "An act to enable the State of Arkansas and other States, to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the Government of the United States, to the contrary notwithstanding: "*Provided,* That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale or location of the same, under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto in such form as shall be prescribed by the Secretary of the Interior: *Provided further,* That if such State shall not, within ninety days from the passage of this act, through its constituted authority, return to the general land office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

SEC. 2. *And be it further enacted,* That upon due proof, by the authorized agent of the State or States, before the Commissioner of the general land office, that any of the lands purchased were swamp lands within the true intent and meaning of the act aforesaid, the purchase-money shall be paid over to the said State or States; and where the lands have been located by warrant or script, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the act aforesaid: *Provided, however,* That the said decisions of the Commissioner of the general land office shall be approved by the Secretary of the Interior.

APPROVED, March 2d, 1855.

United Stated statutes at large, vol. 10, p. 634.

An Act to confirm to the several States the Swamp and Overflowed Lands, selected under the Act of September twenty-eight, eighteen hundred and fifty, and the Act of the second March, eighteen hundred and forty-nine.

Be it enacted by the Senate and House of Representatives of the United States of America, in Cnogress assembled, That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States, to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled "An act to aid the State of Louisana in draining the swamp lands therein," heretofore made and reported to the general land office, so far as the same shall remain vacant and unappropriated, and not interferred with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however,* That nothing in this act contained shall interfered with the provisions of the act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and forty-five, which shall be, and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

APPROVED, March 3d, 1857.

United States statutes at large, vol. 11, p. 251.

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Supreme Court of Illinois.

JANUARY TERM, 1872.

ASAHEL GRIDLEY v. THE CITY OF BLOOMINGTON.

APPEAL FROM McLEAN.

1. It is a rule of pleading applicable to cases like this, that the plaintiff must in his declaration state the nature of defendant's liability, and in order to recover must prove the facts as alleged.

2. Although this may be done by a general mode of allegation, yet, if instead of doing so the plaintiff states the ground of the defendant's liability with unnecessary particularity, he must prove it as laid.

3. The consent of the city to construct a vault under a sidewalk, on a public street, may be inferred from lapse of time.

4. The general rule is, that the occupant, and not the owner, as such, is responsible in consequence of a failure to keep premises occupied in repair. To this rule there are exceptions.

5. The city cannot recover in a case like the present, against the landlord, where the prime cause of the injury was caused by the gross negligence of the tenant. The right to recover by the city is dependant on the right of the city to recover against the tenant in possession, and the right of the tenant to recover against the landlord to avoid circuity of action.

6. The city is primarily liable, but may recover back the amount from the person whose duty it was to keep the premises in repair.

H. & J. D. Spencer, for appellant.

I. J. Bloomfield, for appellee.

The opinion of the court was delivered by

SCHOFIELD, Justice.—Judgment having been recovered against appellee for injuries received by a party in consequence of the defective covering over a vault, which was constructed under a sidewalk for the convenience of premises owned by appellant, this suit was brought to recover the amount that appellee was thus compelled to pay,—appellant having been duly notified, but having neglected to defend the suit. The declaration contains three counts.

It is alleged in the first, that the defendant was the *owner and occupier* of the premises, &c.; that there was a certain hole or opening with a cellar or vault, and belonging to the said premises; which said hole or opening into a cellar or vault of and belonging to the said premises, which said hole or opening into said cellar or vault was caused by defendant's negligently, carelessly and wilfully breaking the flag-stone, wherewith said cellar vault was cov-

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ered, &c., and that the defendant well knowing of said hole or opening, and while he was so the *proprietor*, *owner and occupier* of the said premises with the appurtenances, wrongfully, carelessly and negligently permitted the same to be and continue, &c.

In the second count it is alleged, that the defendant was *possessor*, *owner and occupier* of the premises; that while the defendant was *owner and occupier* of the premises, he wrongfully dug a hole or vault, &c., and so badly, carelessly, insufficiently and dangerously covered said hole or vault, and carelessly and wrongfully continued the same, and while the *owner and occupier* of the premises, &c.

And in the third count it is alleged that the defendant was the *owner and occupier* of the premises, &c., abutting on a certain common public highway and side walk there, which said sidewalk, abutting on said premises, said defendant was legally bound to keep in repair, in which said sidewalk there was a certain hole or opening; that the defendant well knowing the premises while he was so the *owner and occupier* of said premises, real estate and appurtenances, and while there was such hole, &c., wrongfully, negligently and carelessly permitted the said hole to be and continue, &c.

It is a rule of pleading applicable to cases like the present, that the plaintiff must, in his declaration, state the nature of the defendant's liability, and he must prove it as laid. 1st Chitty's Pleading, 417. And, although this may be done by a general mode of allegation, yet, if instead of doing so, the plaintiff states the ground of the defendant's liability with unnecessary particularity, he must prove it as laid. 1st Chitty's Pleading, 265; Stephens on Pleading, 85; 1st Greenleaf's Evidence, § 65; 1st Starkie's Evidence, 377. Is the ground of the defendant's liablity here proved as laid?

It is insisted by the counsel for appellee, that the vault, through the defective covering, over which the alleged injury was received, was constructed without special authority, for a private purpose, by the grantor of appellant, and that appellant had continued it, and is therefore responsible.

It is shown by the evidence that the vault was constructed by the grantor of appellant, many years prior to the time the injury complained of was received, for the convenience of the adjacent

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building which was erected at the same time, and that it has since been used in connection with it, by those occupying the building. It does not appear that the vault was not constructed with due care, or that prior to this cause of action the public was in any way incommoded by its construction, or the state of repair in which it was kept. It seems to have been properly constructed, and, when completed, securely covered with a sound flag-stone, six inches thick, of the kind known as "Joliet Stone." This in the absence of evidence to the contrary, would appear to be sufficient for the legitimate and appropriate uses of a sidewalk. Although no license from the city to make the vault is shown, on the other hand no objection by the city is shown, either to the making of the vault, the mode of its construction, or the state of repair in which it has been kept; and, situated as it is, under the sidewalk of a public street, and for so great a length of time, we cannot presume that those having charge of the streets, under the authority of the city, were ignorant of its existence, or of the respective rights and duties of the city and the owner of the property, in relation to it. We regard this acquiescence as a sufficient recognition by the city, of authority to construct and maintain the vault, in a prudent and careful manner. In *Nelson* v. *Godfrey*, 12 Ills. 26, suit was brought to recover damages resulting to the plaintiff by reason of an excavation for a coal cellar, made by defendant in the sidewalk in front of his premises on State street, in the City of Alton, through which the water from the gutter of the street passed into the defendant's cellar, and thence through to several other cellars, into that of the plaintiff. CATON, J., in delivering the opinion of the court said: "We are not prepared to admit, that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is of great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be inferred in the absence of any action of the corporate authority to the contrary, they having been aware of the progress of the work." To the same effect is, also, Dillon on Municipal Corporations, § 554; *Fischer* v. *Thinkell*, 21 Mich., 1.

Stephani v. *Brown*, 40 Ill., 428, cited in the brief for appellee, is not in conflict with these authorities. In that case the act done was without municipal authority, express or implied. A

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nuisance was created and continued by the defendant, and he was properly held responsible for it.

It is clearly shown by the evidence in the record, that the injury complained of was received in consequence of the flag-stone over the vault having been broken, and a defective covering substituted in its place; that this all occurred at a time when the premises were not occupied by appellant, but when they were occupied by a tenant—one Sabin—and that the flag-stone was broken through the gross carelessness of this tenant, or that of his employees, in unloading a barrel of vinegar upon it from a dray.

The general rule is, that the occupant and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises occupied in repair. *Chicago* v. *O'Brennan*, (decided at September term, 1872); *Cheetham* v. *Hampton*, 4 Durn, & East., 318; *City of Lowell* v. *Spaulding*, 4 Cushing, 277; *Fisher* v. *Thinkell*, 21 Mich., 1; 1 Chitty's Pleading, 95; Taylor on Landlord and Tenant, sec. 4, § 192; 2 Robinson's Practice, 676; Sherman & Redfield on Negligence, (2d Ed.) § 56.

To this general rule the authorities recognize these exceptions:

1st. Where the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair, so that in case of a recovery against the tenant, he would have his remedy over, then to avoid circuity of action, the party injured by the defect and want of repair, may have his action in the first instance against the landlord, but such express agreement must be distinctly proved. See *City of Lowell* v. *Spaulding*; *Fisher* v. *Thirkell*; *Cheetham* v. *Hampton*, *supra*.

2d. Where the premises are let, with a nuisance upon them, by means of which the injury complained of is received, see *Stephani* v. *Brown*, *suqra*.

We have already shown that this case is not, in our opinion, within the second exception stated, and it now only remains to determine whether it is within the first. The counsel for appellee claims that it is, and the special verdict finds that appellant agreed to repair.

We are compelled to adopt a different conclusion.

As has been shown, each count of the declaration alleges, as the basis of appellant's liability, that he is *owner* and *occupier* of the premises, and this must be proved as it is alleged. A more general and comprehensive allegation of appellant's liability might undoubtedly have been used, under which almost any character of proof showing his legal liability would have been admissible, but it was not done, and we must pass upon the case as it is. It surely cannot require argument to prove that evidence of an express agreement to repair does not prove occupancy, nor that evidence of oc-

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cupancy does not prove an express agreement to repair. True, the legal duty resulting may be the same, but the facts from which the legal duty results, are as dissimilar as trespass and contract. Evidence of one does not prove the other.

Nor are we satisfied that the evidence shows an express agreement upon the part of the appellant to repair.

The only evidence upon the subject, in the record, is this:

Appellant says: "I repair any of the buildings I own, without knowing about this particular one." This cannot well be construed into an express agreement. It shows a habit, but nothing more. Sabin says: "I had no bargain with Gridley about taking possession until after I had done so. All I had to do was to pay him the rent." What was agreed between Gridley and himself does not appear.

Could it be pretended that if a recovery was had against Sabin, for this injury, he could recover the amount back, from appellant, on such evidence as this, especially if coupled with the proof in the record, that the prime cause of the injury—the breaking of the flag-stone—was caused by his gross carelessness, or that of those acting for him? We think not. Yet the theory of the right to recover against appellant, on his agreement to repair, is, to avoid circuity of action—suing the tenant, and he then suing the landlord.

The objection urged to the refusal of the instruction asked by appellant, we do not think well taken.

Although the city is primarily liable for the damages sustained we have no doubt of its right to recover back the amount from the person whose duty it was to keep the premises in repair.

For the reasons given we think the Circuit Court erred in overruling appellant's motion for a new trial. The judgment of the Circuit Court is therefore reversed and the cause remanded.

Reversed and remanded.

SCOTT, J., took no part in this decision.

Where the landlord has contracted to repair, and an injury is sustained by a traveler, in consequence of a defective covering of a coal hole, excavated in the sidewalk, the city in case of recovery against it, may recover over in an action against either the landlord or tenant separately, or it may sue them jointly. In *Irvine* v. *Wood, et al*, 51 N. Y., 224. "It was held that where a coal hole had "been excavated in the sidewalk of a "city, and used by a lessee of the prem-"ises for the benefit of which, it was ex-"cavated, and to which it was appur-"tenant, and in consequence of a defec-"tive covering, a person passing fell "through and was injured, that the lessee "was liable separately or jointly with the "lessor for the injuries resulting."

While as between themselves there may be a primary or secondary liability, yet as between them and the party injured, or a city against whom a recovery has been had, both the landlord and tenant are primarily liable, like any other wrong doer. A defectively covered coal hole, in a sidewalk, and all parties who maintain such a nuisance are liable for injuries resulting therefrom; and a failure to recover against one of the wrong doers, is no bar to a suit against another. *Leverin, et al*, v. *Eddy*, 52 Ill., 189.

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THE

MONTHLY

WESTERN JURIST.

JUNE, 1874.

COVENANTS RUNNING WITH THE LAND AS BETWEEN ASSIGNEE OF LANDLORD AND TENANT.

By the act of 1873, Laws of 1873, p. 120, entitled, "Landlord and Tenant," it is enacted that, § 13, "The term 'lease,' as used in this act shall include every letting, whether by verbal or written agreement." § 14, "The grantees of any demised lands, tenements, rents or other hereditaments; or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and the personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry action or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any work or other cause of forfeiture, as their grantor or lessor might have had, if such reversion had remained in such lessor or grantor."

§ 15. "The lessees of any lands, their assigns, or personal representatives, shall have the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives for the breach of any agreement, in such lease as such lessee might have had against his immediate lessor; *Provided*, this section shall have no application to the covenants against incumbrances, or relating to the title or possession of the premises demised."

As the common law stood before the 32 Hen. viii., no one could avail himself of the benefit of a condition to defeat an estate

by entry except the lessor or his heirs, because such right was not assignable at common law. The consequence was, if a lessor conveyed his reversion, although the estate would pass and the assignee of the reversion might recover rent from the tenant in an action of debt, no covenant as such passed to the grantee or assignee of such reversion. Such being the state of the common law, the St. 32 Hen. viii., chap. 34, was passed, and after reciting among other things, "that by the common law no stranger to any covenant could take advantage thereof; but only such as were parties or privies thereunto" proceeded to enact, "that all persons and bodies politic, their heirs, successors and assigns, having any gift or grant of the King, of any lands or other hereditaments, or of any reversion in the same which belonged to any of the monasteries, &c., dissolved, or by any other means, come to the King's hands since the 4th day of February, 1535, or which, at any time before the passing of this act belonged to any other person, and after came to the hands of the King, and other persons being grantees or assignees to or by the King, or to or by any other person than the King, and their heirs, executors, successors and assigns, shall have like advantage against the lessees, their executors, administrators and assigns, by entry for the non-payment of the rent, or for doing waste, or for other forfeiture, and by action only for not performing other conditions, covenants or agreements expressed in the indentures of lease and grantees, their executors, administrators and assignees, as the said lessors and grantors, their heirs or successors might have had." § 2 enacted, "that all lessees and grantees of lands or other hereditaments, for terms of years, life or lives, their executors, administrators or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors and assigns, having gift or grant of the King, or of any other persons of the reversioner of the said lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases as the same lessees might have had against the said lessors and grantors and their successors." This statute was in force in Illinois up to the passage of the act of 1873, above cited, *Plumleigh* v. *Cook*, 13 Ill. 669, and Statute of Ill. there cited. Under this statute it was held by the English courts that leases not under seal did not come within its

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provision, *Bridges* v. *Lewis*, 32, B. 603, *Stoveler* v. *Christmas*, 10, 2 B. 135; but § 13 of our statute above cited, provides that the statute shall apply to every letting, whether by verbal or written agreement. The English statute does not extend to agreements merely collateral, but only such as concern the land. Platt on Leases, 534. Debt would lie by the assignee of the lessee at common law for rent to become due, in virtue of the privity of estate independent of the statute of Hen. 8th, above cited. In England and in this country the great struggle has been, to decide when an action of covenant would lie by or against the assignee. In covenant the cause of action is transitory and not local, and will only lie where there is privity of contract and of course may be brought in any county; but when the duty of paying rent arises out of the privity of estate without privity of contract, the cause of action is local and the action must be brought in the county where the land lies. If there be both privity of estate and privity of contract the plaintiff has his election. *Patton* v. *Deshon*, 1 Gray Mass. 326. The Statute of 32 Hen. 8, c. 34 was intended to extend the right to sue in covenants by and against assignees. *Thursby* v. *Plant*, 1 Saund. 240, our Statute is intended to extend the right to sue in any appropriate action to the same extent, and with all the rights of the original party. The only difference between the first and second section of the English Statute, and the fourteenth and fifteenth section of our Statute is, that the words in the first section apply to the assignee of the reversion and the second to the assignee of the term. It was held by our Supreme Court, *Crosby* v. *Loop*, et. als., 13 Ill. 625, that, "If a lessor makes a qualified grant of leased land, the rent passes to the grantee as an incident of the reversion. But the lessor may sever the rent from the reversion by reserving it, or he may, by a grant of a part of the land to one person, or of the whole land to several persons, create a necessity of an apportionment of the rent between the different owners. It has been intimated by eminent lawyers that there were at common law covenants which ran with the reversion, but the better opinion seems to be that at common law covenants ran with the land but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant, and to be entitled to bring covenant but the assignee of the lessor was not,

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hence the passage of the St. 32 Hen. 8th, ch. 34. Spencer's case is the leading case referred to upon every question, whether a particular covenant does or does not run with the particular lands or a particular reversion, this case is reported in 5 Coke, 16, and published in vol. 1, Smith's leading cases, p. 102, and was this: "Spencer and his wife brought an action of covenant against Clark, assignee to J, assignee to S, and the case was such, Spencer and his wife by deed indented, demised a house and certain land (in the right of the wife), to S for twenty-one years, by which indenture S covenanted for him, his executors and administrators with the plaintiffs that he, his executors, administrators or assigns would build a a brick wall upon part of the land demised, &c. S assigned over his term to J, and J to the defendant, and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee, and after many arguments at the bar, these points were unanimously resolved.

1st. When the covenant extends to a thing in *esse parcel* of the demise, the thing to be done by force of the covenant is *quadammodo* annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee although he be not bound by express words ; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being, as if the lessee covenants to repair the houses demised to him during the term, that is a parcel of the contract, and extends to the support of the thing demised, and therefore is *quadammodo* annexed, appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant; but in the case at bar the covenant concerns a thing which was not in *esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2d. It was resolved that in this case, if the lessee had covenanted for him *and his assigns* that they would make a new wall upon some part of the thing demised, that for asmuch as it is to be done upon the land demised that it should bind the assignee, for although the covenant doth extend to a thing to be newly made,

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yet it is to be made upon the thing demised and the assignee is to take the benefit of it, and therefore shall bind the assignee *by express words*. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a warrantia chartae. But although the covenant be for him and his assigns, yet if the thing to be done be *merely collateral to the land*, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral and in no manner touches or concerns the thing that was demised, or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger.

3d. It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time, to deliver the like cattle or goods, as good as the things letten were, or such price for them, and the lessee assigns the sheep over this covenant, shall not bind the assignee, for it is but a personal contract and wants such privity as is between the lessor and lessee, and his assigns, of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity nor any reversion but merely a thing in action, in the personalty which cannot bind any but the covenantor, his executors or administrators who represent him. The same law, if a man demise a house and land for years with a stock or sum of money rendering rent, and the lessee covenants for him, his executors administrators and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only, and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators and not his assignee. And it is not certain that the stock or sum will come to the assignees hands, for it may be wasted or

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otherwise consumed or destroyed by the lessee, and therefore the law cannot determine at the time of the lease made, that such covenant shall bind the assignee.

4th. It was resolved that if a man makes a feofment by this word *dedi*, which implies a warranty, the assignee of the *feoffe* shall not vouch; but if a man makes a lease for years by this word *concessi* or *demisi*, which implies a covenant if the assignee of the lessee be evicted, he shall have a writ of covenant for the lessee, and his assignee hath the yearly profits of the land which shall grow by his labor and industry for an annual rent, and therefore it is reasonable when he hath applied his labor, and employed his cost upon the land and be evicted, (whereby he losses all) that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5th. Tenant by the curtesy or any other, who comes *in* in the *post* shall not vouch (*which* is in lieu of an action). But if a ward be granted by deed to a woman who takes husband and the woman dies, the husband shall vouch by force of this word *Grant* although he comes to it by act in law; so if a man demise or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses—during the term the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words demise or grant, as on the express covenant. The same law is of tenant by statute merchant, or statute staple, or *elegit* of a term, and he to whom a lease for years is sold by force of an execution, shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law as if a man grant to lessee for years that he shall have so many estovers as will serve to repair his house or as he shall burn in his house or the like during the term it is an appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.

6th. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well as those who come to it by act in law, as by the act of the party for all is one having regard to the lessor. And if the

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law should not be such great prejudice might accrue to him, and reason requires that they who shall take benefits of such covenant when the lessor makes it with the lease, should on the other side be bound by the like covenants when the lessee makes it with the lessor.

7th. It was resolved that the assignee of the assignee should have an action of covenant, so of the executors of the assignee of the assignee, so of the assignee of the executors, or administrators of every assignee, for all are comprised within this word (*assignees*) for the same right which was in the testator or intestate shall go to his executors or administrators, as if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee ; the same law of the assignee of the heirs of the *feoffe* of every assignee, so every one of them shall have a writ of warrantia chartae. For the same right which was in the ancestor, shall decend to the heir in such case without express words of the heirs of the assignees." While it is true there are many covenants which run with the land, binding assigns as well as operating in their favor, there is a distinction between, such as bind assigns without being named, and such as require them to be named, in order to charge them with performance. And the distinction seems to be, whether the subject matter of the covenant is in *esse* at the time of the demise or not. If it is, the covenant binds the assignee whether named or not; if it is not, it does not bind him unless expressly named therein. Thus, if the covenant be to keep a house then on the premises in repair, it runs with the land, and binds the assignee, though not named. But if to build a new house on the demised premises, it will not bind the assignees unless named." Washburn on real property, vol. 1, p. 437. The rule as laid down by Lord Ellenborough on the subject is this : "If the assignee is specifically named, and though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him if it affected the nature quality, or value of the thing demised independantly of collateral circumstances, or if it affected the mode of enjoying it." It has also been held that a covenant by the lessor to pay for improvements to be put on the land by the lessee, is a personal covenant, and does not run with the land to bind the assignee of the reversion. *Tallman* v. *Coffin.* 4 *Comst.* 134, *Bream & Co.* v. *Dick-*

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erman et al., 2 *Humph. Tenn.* 126, *Thompson* v. *Rose*, 8 *Cow.* 269. Platt on leases, vol. 2, p. 406, Smith's, Land, Lord and tenant, 290, 291, Washburn on real property, vol. 1, p. 437. See also, *Masury* v. *Southworth et als.*, 9 *Ohio St.*, 340. Thus the law stood at the time of the passage of the act of 1873, (above cited). It will be noticed by an examination of sections thirteen, fourteen and fifteen, of the act of 1873, that they are much broader than the act of 32 Hen. 8 and that they give an action to the assignee or assignees for the non-performance or breach of any agreement in the lease, for which the original party would have been liable, and this whether the lease is under seal or in parol and settling, I apprehend for all time to come, many legal questions that have vexed the courts for three hundred years.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

The Statutes of the United States having a practical bearing upon such right, are, 1st, The act of September 24th, 1789, commonly called the Judiciary Act. 2d, The act of July 27th, 1866. 3d, The act of March 2, 1867. The 12th section of the Judiciary act of 1789, provides that "If a suit be commenced in any State Court against any alien, or by the citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum, or value of five hundred dollars exclusive of costs to be made to appear to the satisfaction of the court, and the defendant shall at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, (or if in the District of Maine, to the District Court, next to be holden therein, or if in Kentucky District, to the District Court, to be holden therein), and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing, and entering special bail was originally requisite therein ; it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause ; and any bail that may have been

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originally taken shall be discharged; and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

The act of July 26th, 1866, provides "That if in any suit already commenced, or that may hereafter be commenced, in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the State in which the suit is brought, is or shall be a defendant; and if the suit, so far as relates to the alien defendant or to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted, for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and of all the pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein; and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal; and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or

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estate so attached to answer the final judgment, in the same manner as by the laws of such State they would have been holden, to answer final judgment had it been rendered by the court in which the suit was commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause shall be removed; and any bond of indemnity or other obligation given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process against the defendant petitioning for the removal of the cause, shall also continue in full force, and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction, or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner and with the same force and effect as if such injunction, attachment, or restraining process had been granted, and such bond originally filed or given in the court to which the cause is removed. And such removal of the cause, as against the defendant petititioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants, if he shall desire it to do so. And the copies of all pleadings filed or entered as aforesaid in the United States court by the defendant applying for the removal of the cause, shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of the courts of such State, if the cause had remained in the State court."

This act was amended by the act of March 2, 1867, which provides: "That when a suit is now pending, or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and the citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final

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hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court: and it shall be, thereupon, the duty of the State court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process; and all the provisions of the act to which this act is amendatory respecting any bail, attachment, injunction, or other restraining process, and respecting any bond or indemnity, or other obligation given upon the issuing or granting of any attachment, injunction, or other restraining process, shall apply with like force and effect in all respects to similar matters, process, or things in the suits, for the removal of which this act provides."

Under the act of 1789 the petition for removal must be filed *at the time of the entry of appearance in the State court*; while under the act of July 27th, 1866, as amended by the act of March 2d, 1867, the petition may be filed *at any time before final hearing or trial of the suit.* The several acts of Congress above cited are not repugnant; they stand together and either may be used as the interest of the petitioner may require, 2 Abbott's U. S. Practice, p. 39, *Sweeney* v. *Coffin*, 3 Law Times, p. 18. When the damages claimed in the declaration exceed the sum of five hundred dollars, it is error for the State court to refuse the defendant's petition for a removal of the cause to the Circuit Court of the United States, upon the ground that it does not appear to the satisfaction of the court that the amount in controversy exceeded the sum of five hundred dollars. The sum demanded in the declaration is the amount in controversy, *Gourdin* v. *Sargent*, 16 Pet. 97. And after the filing of the petition the State court cannot inquire into the intention of the plaintiff not to claim the full amount, nor can the declaration be so amended as to reduce the *ad damnum* below the

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sum of five hundred dollars, *Kanouse* v. *Martin*, 15 How. 207. The filing of a petition, regular in form and proved according to law, operates to divest the State court of all further jurisdiction in the case. In the case of *Kanouse* v. *Martin*, *supra,* the court say, "Without any positive provision of any act of Congress to that effect, it has long been established that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it." *Morgan* v. *Morgan*, 2 Wheat., 290; *Clark* v. *Mathewson*, 12 Pet., 164. And, consequently, when by an inspection of the record, it appeared to the court of common pleas that the sum demanded in this action was one thousand dollars, and when it further appeared that the plaintiff was a citizen of the State of New York, and the defendant of the State of New Jersey, and that the latter had filed a proper bond with sufficient surety, a case under the twelfth section of the Judiciary act was made out, and according to the terms of that law it was "then the duty of the State court to accept the surety and proceed no further in the cause."

It is irregular to enter a default against a party in a State court while his application for a removal of a cause into a Circuit Court of the United States is pending, and a default entered under such circumstances should be set aside on motion, *Mattoon, impleaded, &c.* v. *Hinkley*, 33 Ill., 208. In the case of *Treadway and Wife* v. *The Chicago & Northwestern Railway Co.*, 21 Iowa, 351. The defendant, the Chicago & Northwestern Railway Co. filed in the District Court the following petition:

William B. Treadway and Thalia M. Treadway *v.* The Chicago & Northwestern Railway Company. *To the District Court of the State of Iowa' within and for the county of Lynn.*

Your petitioners, the Chicago & Northwestern Railroad Company, respectfully state to the court, that an action has been commenced and is now pending in the District Court aforesaid, by William B. Treadway, and Thalia M. Treadway, as plaintiffs, against your petitioners. That said plaintiffs are citizens of the State of Iowa, that your petitioners are citizens of the State of Illinois, incorporated by that name by the said State, and having their principal place of business therein; that the matters in dispute in said action exceeds the sum of five hundred dollars, exclusive of costs. The damages claimed by said plaintiffs being laid in their petition herein at ten thousand dollars; that special bail was not originally required in said action. Your petitioners therefore ask for the removal of the said cause for trial into the next Circuit Court of the United States, to be held in the Dis-

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trict of Iowa, and your petitioners now offer good and sufficient surety for their entering in such Circuit Court, on the first day of its next session, copies of the process against them in said action.

C. & N. W. R. R. Co.,
By Green, Dudley & Belt,
their attorneys."

The petition was sworn to, and at the same time the defendants offered a bond with good and sufficient surety for their entering copies of process in said action in said Circuit Court, on the first day of its next term, but the court refused to allow the said petition for removal, to which ruling the defendants excepted, and appealed to the Supreme Court, and it was there held that the defendant was a corporation, organized under the laws of the State of Illinois, and doing business in the State of Iowa, in operating a railroad, as the lessees of a domestic corporation. That for all jurisdictional purposes, as respects the federal courts, the defendant should be regarded as a citizen of the State of Illinois, and that the defendant had the right to elect in cases specified in the Judiciary act, to proceed or be proceeded against in the courts of the United States. The rule is under the acts of Congress, above cited, that a corporation is a citizen of the State from which it derives its charter, and has all the rights of a natural person, *Louisville R. R. Co.* v. *Letson*, 2 How., 497; *Marshall* v. *Balt. R. R. Co.*, 16 How., 314; *Treadway and Wife* v. *C. & N. W. Railway Co.*, 21 Iowa, 351; Abbott on Corporations, p. 826; *Cowles* v. *Mercer Co.*, 7 Wallace, 118; see also the *Covington Drawbridge Co.* v. *Shepherd, et als*, 20 How., 232. Where a corporation is created by the laws of a State, the presumption of law is that the persons who compose the corporation are citizens of the State creating the corporation, and no averment or evidence to the contrary is admissable for the purposes of withdrawing the suit from the jurisdiction of the United States courts, *Ohio & Miss. R. R. Co.* v. *Wheeler*, 1 Black, 296. The petition to be filed for the removal of a cause from a State court to the Circuit Court of the United States, under the act of Congress of Sept. 24th, 1789, is not required to state the alienage or citizenship of the parties, or the amount in controversy. The act does not require the petition to be verified in any manner. The usual mode in which such facts are made to appear is by stating them in the petition for the removal of the cause, and having its truth verified by affidavit. The necessary facts may be made to appear, either by the petition duly verified by the admission of the parties by affidavit, or by witnesses. But under the act of July 27th, 1866, as amended by the act of March 2d, 1867, *supra*, the party is required to file an affidavit of the truth of the facts relied upon. The proper practice is for the party objecting to an order upon the petition, to preserve the evidence upon which it was made, in a bill of exceptions, and the record would then show whether the order was, or was not erroneous. *The People, ex rel, Western Trans. Co.* v. *The Superior Court*, 34 Ill., 357; *Hartford Ins. Co.* v. *Vanduzer*, 49 Ill., 489. The ultimate power of determing the boundary line of the two jurisdictions, (State and Federal), was constitutionally vested in the courts of the United States, and their decision on that subject is conclusive. The construction placed upon the acts of Congress for the removal of causes from the State to the Federal courts, above cited, is conclusive, on the State courts, *Taylor* v. *Wattles*, 3 Gill.; 226; *Lender* v. *Kidder*, 23 Ill., 51; *Finn* v. *State Bank*, 1 Scam. 87; *Treadway and Wife* v. *C. & N. W. Railway Co.*, 21 Iowa, Iowa, 351; see also 53 Barb., 480.

The form of petition given in the case of Treadway and wife can be modified so so as to be made to apply to any case arising under the act of 1789, and the following form of petition can be changed so as to apply to any case arising under the act of 1867.

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PETITION UNDER ACT OF MARCH 2, 1867.

(WITH AFFIDAVIT.)

STATE OF .... } ss.
COUNTY OF.... ... . }

IN THE .... COURT.

....

——o——

....Plaintiff, }
Against }
The .... Defendants. }

The said defendants, The........... by their.......... agent and by their attorney, whose signatures are hereto subscribed, come and show to this Honorable Court that the plaintiff in the above entitled suit was, at the commencement thereof, ever since has been, and still is, a citizen of the State of.......... and that said defendants at the time of the commencement of said suit were, and ever since that time have been, and now are, citizens of the State of.......... and are also a Corporation organized and existing under and by virtue of the laws of said last named State, their principal place of business therein; and further show that the matter in dispute in said cause now pending in said...........Court of...........State of...........exceeds the sum of Five Hundred Dollars, exclusive of costs, as fully appears by the ....of said plaintiff filed in said cause; wherein he claims to recover of said defendants the sum of...........Dollars.

And the said defendants further show that said defendants have reason to believe, and do believe, that from prejudice and local influence they will not be able to obtain justice in the said..... ......Court.

Therefore the said defendants pray that, in accordance with the Act of Congress, in such case provided, an order be made by this Honorable Court that the aforesaid cause be removed for trial into the next Circuit Court of the United States for the. .... District of .... to be held at...... .....in said State of.......... on the...........day of.......... A. D. 18...... And the said defendants offer as good and sufficient surety that they will enter in said Circuit Court of the United States, on the first day of its session aforesaid, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and for the doing of such other and appropriate acts as by an act of the Congress of the United States, entitled "An Act for the removal of causes in certain cases from State Courts," approved July 27th, 1866, are required to be done in that behalf, the bond herewith presented and the sureties who have subscribed, or shall be required to subscribe the same.

And your petitioners will ever pray, &c.

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IN WITNESS WHEREOF, the said The............have caused their Corporate name to be hereunto subscribed and their Corporate seal to be hereunto affixed by............their............agent, this........... day of ....A. D. 18 ......

....

By... .... Agent.

State of........................ } ss.
County of....................... }

In ....Court.

...................................Plaintiff,
vs.
..............................Defendants.

..............being first duly sworn, deposes and says that he is the ....agent and managing officer within and for the State of...... ..... of the business of the above named defendants, and is now acting in such capacity, and as such has the power and authority to subscribe the foregoing petition on behalf of said defendants, to affix their corporate name and seal thereto and to make this affidavit in support thereof; that he has read and well knows the contents of said petition and says that, all and singular, the statements therein contained are true in manner and form as therein set forth;..... .... that said defendants have, and this deponent also has, reason to believe, and both said defendants and this deponent do believe, that from prejudice and local influence the said defendants will not be able to obtain justice in said ....Court of ....and further deponent says not.

....

Subscribed and sworn to before me by said............this............day of............
A. D. 18.......

....

BOND UNDER ACT OF MARCH 20, 1867.

KNOW ALL MEN BY THESE PRESENTS, That the..... ..... as principals and.............of the County of.............and State of .... as surety, are held and firmly bound unto............of............in the penal sum of...........Dollars, to be paid to the said .... to the payment whereof, well and truly to be made, the said, The.......... and the said ....jointly and severally bind themselves and the heirs, executors, and administrators of the said.. ....firmly by these presents,...........

IN WITNESS WHEREOF, the said, The ....have caused the name of their............Agent and their Corporate Seal to be hereunto

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affixed, and the said............has hereunto set his hand and seal, this ....A. D. 18.......

The condition of this obligation is such that, whereas the said .... ha...brought a certain suit in the ....Court of............in the State of............at the ....term, A. D. 18..... , of said Court, against the said, The............to recover the sum of............ Dollars,............ and whereas, the said, The ....have on the day of the date hereof filed their petition in said Court, praying that said suit may be removed for trial into the next term of the........... Court of the United States, for the District of............to be held at .... in said District on the ....of............A. D. 18......

Now if the said, The.............. upon the granting of the petition aforesaid, shall enter in said last named Court on the first day of its said Session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and shall moreover, do all such other appropriate acts as by an Act of the Congress of the United States, entitled "An Act for the removal of causes in certain cases from State Courts, approved July 27th, 1866, are required to be done upon the removal of a suit into the United States Court, this obligation shall be void, else to be and remain in full force and effect.

The......... ....by................. Agent.

[Corporate Seal.] ....[SEAL.]

BOND UNDER ACT OF 1789.

KNOW ALL MEN BY THESE PRESENTS, That we, ... of the County of...........and State of.... ...... are held and firmly bound unto .... in the penal sum of (amount fixed by Court,) for the payment of which we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

WITNESS, our hands and seals. this ....day of 187

The condition of the above obligation is such, that whereas,.. .... has prepared and is about to present to the Circuit Court of the County of.........in the State of.........a petition praying for the removal of a certain cause now pending in said Court, wherein.............is plaintiff, and........... is defendant, from said Court, to the Circuit Court of the United States, for the (here state District.) Now therefore, if the said ....shall on the first day of the next session of said Circuit Court of the United States, to be held on the (here state the day,) enter his appearance in said action, in the Court last mentioned, and shall on the said first day of the next session of said United States Circuit Court file therein copies of the process against, and all pleadings, depositions, testimony and other proceedings in said action, then this obligation to be void, otherwise to remain in full force and effect.

.... [SEAL.]

.... [SEAL.]

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Supreme Court of Illinois.

OPINION FILED JANUARY 30, 1874.

NATHAN DISBROW *v.* CHIGAGO & NORTHWESTERN RAILWAY CO

APPEAL FROM MCHENRY.

RIGHT OF COMPANY TO STOP CARS IN FRONT OF EATING HOUSE.

This was an action by plaintiff against the defendant, to recover damages caused by the standing of freight cars on the company's railway track in front of an eating house of the plaintiff, at the time when the passenger trains on defendant's road stopped at the station for meals: held, that the plaintiff could not recover.

Opinion by SHELDON, J.

This was an action on the case brought by Disbrow against the Chicago & Northwestern Railway Company, to recover damages caused by the standing of freight cars on the company's railway track in front of an eating-house of the plaintiff, at the time when the passenger trains on defendant's road stopped at Harvard for meals.

The complaint in the declaration is that the defendant, intending to injure the plaintiff, and to prevent the use and enjoyment of his building as a railway eating-house at the time when the passenger trains stopped for meals, wrongfully caused freight and other cars to be stationed on the tracks of the railroad in front of plaintiff's eating-house, and thereby obstructed the access of railway passengers thereto.

The evidence shows that Harvard is a station on defendant's road, where a large number of cars stop. That trains are made up there. That the repairing shops of the company are at that place. That there are six tracks of its railroad. Defendant had an eating-house in close connection with its depot, the eating-house being situated on the side of the six tracks, on which passengers were received, and on which they landed from the cars. On the other side of these six tracks was the plaintiff's eating-house. It was in evidence that plaintiff had been an annoyance in his soliciting on the cars of passengers, as customers for his eating-house; that in doing so he had exposed himself to danger of injury about the cars, and he had been forbidden from the cars for that purpose of soliciting passengers. It was in evidence that constant switching was going on, while trains stopped for meals, and that it was dangerous for passengers to cross the tracks to plaintiff's eating-house.

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There was a verdict and judgment in favor of the defendant, in the court below, and the plaintiff appealed. We cannot see here any cause of action. Whether the stationing of the cars as alleged, was in the necessary transaction of the company's business, or for the purpose of preventing access to the premises of plaintiff across the tracks of defendant's road, we conceive makes no difference. It was a means it might properly adopt for the safety and protection of its passengers, and to guard against its own exposure to liability for damages which might be sustained in crossing over its tracks. What was done was in the lawful use of the defendant's own property—what it had the right to do, in virtue of its ownership of the estate. It was not obliged to keep open an unobstructed way for the passage of persons to and fro across its tracks, for the accommodation of the private business of an individual.

The plaintiff could assert no right of a passage way over the tracks of defendant's road. No right of his was interferred with. There is some evidence tending to show that the sidewalk and a public street crossing over the track were obstructed. But no such cause of action is set forth in the declaration. There is no averment in it of the obstructing of any way over which the plaintiff had a right of passage. The view taken renders it unnecessary to consider the several further errors which have been assigned. We consider that there is no cause of action proven, or laid in the declaration.

The judgment is affirmed."

The right of eminent domain, by which private property may be taken for public use, is a sovereign power. It is not conferred, but limited by the constitution, and under the constitutions of 1818 and 1848, the legislature was authorized by proper legislation to divest the title of the citizen to his land. No property can be taken without legislative authority, and in the manner and for the purposes, and to the extent authorized. In all cases where the State has taken a fee simple estate, or authorized the taking thereof, and compensated the owner therefor, the subsequent abandonment of the use will not re-invest the owner with the title. *The Waterworks Co.* v. *Burkhart*, 41 Ind., not yet reported. But under the constitution of 1870, where only an easement can be taken the rule is otherwise. The power of eminent domain can only be exercised under the constitution, by making just compensation, and is strictly applicable, only to the condemnation and injuries to property, and cannot be extended to the levy and collection of a tax, *Harward* v. *St. Clair Drain Co.*, 51 Ill., 130; *Hessler* v. *Drainage Coms.*, 53 Ill., 105. Prior to the adoption of the constitution of 1870,

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in all cases where the right of eminent domain was exercised, damages assessed and accepted by the owner, the title thereby became divested, *Rees* v. *City of Chicago*, 38 Ill., 322. In the case of *The State* v. *Evans*, 2 Scam., 208, it was held that, "By the appropriation of the lands of an individual to the use of the public, under the internal improvement law and the act concerning the right of way, the land thus taken became vested in the State, upon the payment of the damages, and that the original owner was from thenceforth divested of all right and title to the same." See also, *Chicago & Miss. R. R.* v. *Patchin*, 16 Ill., 198. Prior to the act of 1872, entitled "An act to provide for the exercise of the right of eminent domain," Laws of 1872, p. 402, damages were required to be assessed by commissioners, appointed by the court. By this act damages are to be assessed by a jury in the manner prescribed by the act. It is to be presumed that in all cases where commissioners have been appointed, and assessed damages, that they did their whole duty, and assessed damages for all injuries which they might lawfully take into consideration. Under the law prior, and since the passage of the law of 1872, the commissioners prior, and the jury under the act to assess the damages, which will necessarily result from the proper construction of the railroad, they are not merely to assess the value of the soil taken, or the injury to the land, but "the damages sustained by the owner of the land." By the assessment and payment of damages the corporation acquire a right to construct the road in a skillful and proper manner, and the right to use the proper, usual and necessary means to accomplish that object. In the assessment of damages, "All injuries which are appreciable, and which result from the construction of the road are legitimate subjects in the estimation of the damages." *A. & S. R. R. Co.* v. *Carpenter*, 14 Ill., 191; *St. L., V. & T. H. R. R.* v. *Mollett*, 59 Ill., 337. In estimating the damages and benefits to result from the constrnction and use of a railroad over land which has been condemned for that purpose, the jury are not confined to the consideration of the state of facts at the time the land was taken, but may consider the subject in the light of the facts as they existed at the time of the trial, *Hays* v. *O. & F. R. V. R. R. Co.*, 54 Ill., 373. The line of demarkation between damages that are regarded in law as appreciable, and damages that are regarded by the law as too remote is not always easily determined. It would seem that all damages are appreciable that are the proximate result of a proper construction and operation of a railroad. In the case of *Railroad Co.* v. *Yeiser*, 8 Penn., St. 366, it was held that the assessment embraced probable damages from fire caused by the necessary emission of sparks from the engines to be used in doing the business of the company. The assessment of damages by commissions is not a cumulative remedy, but is the substitution of one mode for another, and their decision is final upon the merits, subject only to the right of appeal. In the case of *Aldrich* v. *Cheshire Railroad Co.*, 1 Foster, 361, the Supreme Court of New Hampshire say, "Whether the commissioners take into consideration all the circumstances proper to be adverted to by them depends on their attention to the subject, and their capacity to come to a correct conclusion. But the result they reach is conclusive upon the party unless there be an appeal from their decision. This is plainly the intent of the statute for the institution of this tribunal would be useless, unless their estimate should be regarded as final. Any other view of the question would lead to great practical difficulties, for if

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we might go behind their assessment it would be impossible to draw any line beyond which we should not proceed. There would be scarcely any injury a land owner could sustain, which might not be said with more or less plausibility to be one which the commissioners did not take into consideration. They are not bound to specify each injury, and the sum awarded for it, and thus enable us to ascertain in what manner and upon what grounds their judgment has been made up, and when this is not done it is obviously impossible for the court to say, that for this or that special injury the land owner has received no compensation. To require this of them, would take from them all the power of action as an independent tribunal. It would not permit them to exercise their own judgment, without any supervision, over the merits of a case, as the statute intended, unless where an appeal has been interposed, but would compel them to be interrogated, and in a manner cross-examined as to the mode in which they had discharged their duties. Having the power to consider all the injuries the owner has sustained, and having made an assessment, the presumption is, that they have done their duty, and have considered all matters worthy of their attention." See also *Lebanon* v. *Olcott*, 1 N. H. Rep., 339; *Woods* v. *Nashua Man. Co.*, 4 N. H. Rep., 527. Both these cases were actions on the case for erecting dams and causing injury thereby to the respective plaintiffs, and in each of them damages were awarded by a committee designated, in the charter of incorporation, and the position above stated was not denied by the plaintiffs. It seems that all damages that are appreciable, arising from a proper construction and operation of the road are to be considered by the commissioners, and now by the jury under our statute, and for such damages the land owner cannot afterwards recover, and is estopped from investigating the question as to whether the particular] damage claimed for, was allowed by the commissioners or jury assessing the damages or not. The presumption is, that every injury, which in the judgment of law would result to the property to be effected by the construction and operation of a railroad, was foreseen by the commissioners assessing the damages, and included in their estimate. *Furness* v. *Hudson* R. R. R. Co., 5 Sandford, 551. The award of damages for the construction and operation of a railroad is exhaustive, and the land owner cannot maintain an action for damages which should have been but were not assessed and allowed, even though they were claimed before the commissioners, and erroneously disallowed. *Vanschoick* v. *Delaware & Raritan Canal Co.*, N. Y. Supt. Ct. 1 Spencer, 249. It was held in the case of *Aldrich* v. *Cheshire R. R. Co., supra*, that a land owner whose buildings were supplied with water from a permanent spring, cannot maintain a suit for damages for loss of the spring, where the same had disappeared after an excavation on his land, whereby the water was drawn from the spring into the excavation, where the damages were assessed to him before the excavation, that the result would be presumed to have been considered. In the case of *Butman* v. *V. C. R. R. Co*, 27 Vermont, 500, it was held that the decision and award of commissloners appointed, to assess the damages sustained by a land owner from the location of a railroad is a judicial act, and unless appealed from becomes *res adjudicata*, and cannot be collaterally impeached. And that after an appraisal by such commissioners, which is not appealed from or otherwise vacated, an action at law cannot be maintained to recover damages which were not appraised and awarded in con-

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sequence of the false representations by the agents of the railroad in regard to the manner in which the railroad was to be constructed. And the question whether in the absence of fraud in the making of such representations the land owner could have any remedy in Chancery, or by a reassessment by the commissioners, was not determined. See *St. L. V. & T. H. H. R. Co.* v. *Mollett*, 59 Ill., 236. The case of *Norris* v. *The Vermont Central R. R. Co.*, 27 Vermont, 99, involved the liability of a railroad company in turning a river, and the effect of a deed of land to a railroad company, and it was there held, that when a railroad company rightfully and properly turn a stream of water, they are not obliged hereafter to observe the action of the water, and so protect the banks or take other timely measures as to prevent the encroachment of it upon neighboring lands. And that when a piece of land was deeded to a railroad company it is to be presumed that the contingent damages which would have been included in an assessment of the damages by commissioners upon a compulsory taking of it, were considered in determining the price which was paid for it. Plans and estimates are proper evidence to be considered by the commissioners or jury in determining the amount of damages to be allowed. It was held by the Supreme Court of this State, in the case of the *Jacksonville and Savannah R. R. Co.* v. *Kidder*, 21 Ill. 131, that the Company would be bound to construct the road substantially according to the plans and estimates thus offered in evidence, and that if the company should deviate from the plans and estimates so offered in evidence, so as to occasion additional damages, such damages could be recovered in an action on the case, and that while the railroad company would not be bound by the verbal representations of engineers and others, such persons may be examined for the purpose of explaining the plans and estimates, where there is no fraud on the part of the railroad company in procuring the appraisal, and if the railroad company assume to build the railroad in a particular manner across the land of the party in consideration of having the damages assessed upon that basis, it would seem that the remedy must be upon such special understanding. *Butman* v. *Vt. C. R. R. Co.*, 28 Vermont, 503. The authorities here cited, hold that the assessment and payment of the damages and in cases of conveyance by deed authorize the construction in a proper manner, and the operation with due and proper care, of a railroad over the right of way so condemned or conveyed, and that so long as the railroad company keeps such railroad in proper repair, and operate the same with due and proper care, there is no liability to the land owner adjoining the right of way. The operation of a railroad with proper care, would evidently include the duty of the company to operate the road in accordance with the proper police regulations of the State and municipalities through which the line of road passes.

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In the Circuit Court of Sangamon County.

THE PEOPLE OF THE STATE OF ILLINOIS v. THE CHICAGO & ALTON RAILROAD COMPANY.

1. The act of Congress, approved April 20th, 1871, entitled an "act to enforce the provisions of the 14th Amendment to the Constitution of the United States, and for other purposes" construed.

2. The 14th Amendment to the Constitution of the United States considered and construed.

3. Held that the 14th Amendment to the Constitution, and the acts of Congress cited apply to natural persons only, and not to corporations.

4. That until the defendant is deprived of some right under the State law, he is not entitled to the writ of certiorari, to remove the cause into the courts of the United States.

The opinion of the court was delivered by

ZANE, J.—This suit was instituted at the February term of this court, in the name of *The People of the State of Illinois* v. *The Chicago & Alton Railroad Company*, to recover penalties against that Company in consequence of its failure to comply with the act of the Legislature of the State of Illinois, fixing the maximum rates of freight and passenger tariffs, or authorizing the Railroad Commissioners to do so.

At the second week of the May term of this court—the present term—a writ of *certiorari*, issued by the Clerk of the United States Court, was served upon the Clerk of this court, requiring the court to certify all papers in the case into that court, and the question now arises, did the service of that writ take the case out of this court into the United States Court.

If there was any law authorizing the issuance of this writ, then it did take the case out of this court, as I shall hold. But, in order to ascertain that fact, it is necessary to inquire whether there is any act of Congress authorizing the issuance of that writ, in cases of this kind.

A number of acts of Congress have been referred to, but the one that is relied upon is the act approved April 20th, 1871, entitled, "an act to enforce the provisions of the 14th amendment of the Constitution of the United States, and for other purposes, even as it would be conceded I presume, by every one, that these other acts would not authorize the issuance of this writ, and the removal

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of this case, on the way it has been insisted that it is already removed, without this act to enforce the 14th amendment to the Constitution. This professes to be and is an act to enforce the provisions of the 14th amendment. Not to enforce its own provisions of the 14th amendment, and the question arises then, what are those provisions?

Article 14th of the Constitution, which is the 14th amendment, contains 5 sections; the first one refers to the rights of persons—life, liberty and property; the second to representation, and the third to the qualification of Senators and Representatives in Congress, and Electors of President and Vice President. The fourth refers to the public debt, and the fifth provides that Congress shall have power to enforce by appropriate legislation the provisions of this article. So that, then, the first section of this amendmendment to the Constitution is the one that this act of Congress was intended to enforce.

This section reads as follows:

"All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make cr enforce any law which shall abridge the privileges or immunities of a citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

The first clause of this section reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." The clause evidently refers to natural persons. I suppose it will not be denied that the birth referred to is a natural one, and not artificial, nor produced in some legislative body. The second clause is: "No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States." The words "citizen" and "person," in this section, I am inclined to hold are synonymous terms, and that by the term "person" was meant a natural person—a citizen of the United States, and of the State in which he may reside.

But a question has been raised—and it is said that Judge Drummond has held that this includes persons—that persons by

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virtue of this act have a right to the benefit of the act in the name of the corporation. I believe that he has so held ; but I should be inclined to hold that such was not the meaning of the Constitution. In this case, the people of the State of Illinois are plaintiffs, and the Chicago & Alton Railroad is defendant. It is, therefore, a suit between corporations.

Now, the first section of the act of April 20th, 1871, reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That any person, who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States, to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress ; such proceeding to be prosecuted in the several District or Circuit Courts of the United States with, and subject to the same rights of appeal and review upon error, and other remedies provided in the law organizing such courts, under provision of the act of the 9th of April, 1866, entitled : "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication,' and other remedial laws of the United States, which are in their nature applicable in such cases."

According to the view that I take of this section, the person referred to in this section, as well as in the amendment to the Constitution, is a natural person, and the rights spoken of are the rights of a natural person; and, taking into consideration the evils that are intended to be remedied by this act—that particular class of natural persons consisting of the colored people of this country, who had previously been in a condition of slavery; though if it should apply to all persons, I should hold that it did not apply to corporations, because the word "person" as used, both in the sections quoted and in the amendment, means a citizen of the United States—expressed in one place, implied elsewhere—a citizen of the United States.

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There was another question, also, raised upon this section of the law, which is this: I quote again, "Any person who, under color of any law, statute, ordinance, custom or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to a deprivation of any of the rights, privileges and immunities secured by the Constitution," etc.; according to the view that the court takes of this section and of this language, it means the actual deprivation of a right, not an attempt to deprive a person or corporation of a right. There has been no deprivation of a right, as the court is bound to know in this case, because there has been no trial in the case, there has been no judgment and the defendant has been deprived of no right of which complaint could be made under this section of the law, and should therefore hold that there could be no violation of this section until the defendant was deprived of a right which he possessed by virtue of the Constitution of the United States.

Now of course nobody can know what the courts of this State will hold. It may be that this defendant will now be deprived of this right which he claims is in danger of being interferred with. If this court should take the view that the defendant doubtless insists upon, that this law of the State is unconstitutional and invalid; the Constitution of the United States should be insisted upon, and the court should hold that the law is unconstitutional, then this court would not deprive the defendant of any right guaranteed by the Constitution of the United States. And if the case should be taken to the Supreme Court of the State, and it should hold that this law is unconstitutional, the defendant would not be deprived of any right guaranteed by the Constitution of the United States.

But till he is deprived of some right, till the defendant is deprived of some right, he has no rights under this provision of the statute.

If the defendant has not been deprived of a right specified in this act, then he has no right to the writ issued by the Clerk of the Circuit Court for the Southern District of Illinois.

I therefore hold that this case is still in this court, and it is on the docket for trial, and it will be treated as any other case on the docket, and will be tried at the present term of court, unless an affidavit is filed which is sufficient in the estimation of the court to

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entitle it to a continuance, or the parties consent that it should be continued to the next term of court.

I will set the case down for trial on Saturday morning, and then such disposition can be made of it as parties at that time shall direct to be made.

Supreme Court of Illinois.

DANIEL SULLIVAN *v.* THE CITY OF ONEIDA.

1. CITY CHARTER—*ordinances—liquor nuisance.* Where a city charter authorized the common council to declare the selling, giving away, or the keeping on hand for sale any spirituous or intoxicating liquors, etc., in the city, a nuisance, it does not authorize an ordinance making it an offense for any person within the city to have in his or her possession any intoxicating liquors, etc. The ordinance exceeds the power in the charter as it declares the possession, without the intent to sell, an offense.

2. The charter only contemplates a search in the event that liquors were in the possession of some person for sale within the city. The ordinance authorizes the search and seizure if the liquors were kept in the city, whether the intention was to sell them or ship them for sale elsewhere. Such an ordinance might interfere with general commerce, but when confined to the ordinary traffic between the city and its neighboring towns and cities, it is unjust and illegal, and the ordinance is *ultra vires* and void.

3 CITY ORDINANCES—*presumption of innocence.* It is no answer to say that the person whose liquor is seized may prove his nnocence—may show the purpose to be lawful. The law ought not to be guilty of such harshness as to require a man to prove his innocence where there is not even a suspicion of his guilt.

4. LEGISLATIVE POWER—*to restrain sale of spirits.* It has often been decided that the general assembly may prohibit the retail of intoxicating liquors. But this charter has gone far beyond that, as it authorizes the council to license, regulate and tax and sale of such liquors; to declare the sale, and keeping on hand for sale, a nuisance; to provide for its summary abatement and suppression; and it empowers the police magistrate to issue his war-

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rant to search the premises of persons suspected of selling. It makes the mere possession *prima facie* evidence of unlawful intent, and, without satisfactory explanation, evidence of sale and keeping on hand for sale.

5. City ordinance. The ordinance authorizes the police magistrate, on complaint that any person has such liquor for sale, more than one gallon, to issue his warrant for the search of his dwelling house, and if liquors are found they shall be seized, and person arrested, and both brought before the magistrate, who shall at once proceed to try the person, and if he should not offer a satisfactory explanation and show that he had the liquors for a lawful purpose, he shall be fined, and ordered to the common jail until fine and costs are paid, and the liquors ordered sold on execution and the proceeds applied to the payment of the fine and costs.

6. The ordinance is objectionable because, while it professes to prevent the sale of liquors because they are declared to be a nuisance and should be abated, it requirs the liquors to be sold by the officer.

7. Same—*objectionable*. Another objection is, that both the charter and ordinance authorize the seizure of all liquors found without reference to quantity; whilst the ordinance only authorizes a fine of $100, it authorizes a seizure of liquors to the value, it may be, of thousands of dollars, which would be ordered to be sold, as is supposed, to satisfy the fine, as it will not be presumed the sale would be ordered merely for the exercise of unusual or arbitrary power. Again, the ordinance does not require the surplus to be returned to the owner.

8. Justice of the peace—*jurisdiction*. Whilst a justice of the peace could only render a fine not exceeding $100, yet, under this charter and ordinance, he is authorized to adjudicate to an unlimited amount of property, and this seizure is unreasonable and in violation of the Declaration of Rights.

9. Constitutional protection. Every man has the right to acquire and protect his property; to be secure against unreasonable searches and seizures; to a fair trial before he can be deprived of life, liberty or property; and in all criminal prosecutions the right to be heard, to demand the nature and cause of the accusation against him, and to meet witnesses face to face. Under this ordi-

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nance a person may be deprived of his property without notice; condemned without witnesses; his premises subjected to unreasonable search, and his property seized to an unlimited amount.

10. PROPERTY. Spirituous liquors, ale or beer, are property; they are chattels; are articles of consumption and of commerce; and the ordinance recognizes them as property and directs their sale, and permits druggists to keep them. Their abuse may be restrained and punishment inflicted on those who sell them to the injury of others. As well as other chattels, they may come under the designation of a nuisance, and to a certain extent lose their quality of property, but they cannot do so *per se*.

11. LEGISLATIVE POWER—*its exercise*. The legislature may change the presumptions of guilt; it may, to a certain extent, declare acts evidence of an unlawful intent which had before been innocent; it may declare possession of property, on account of its dangerous character, unlawful, but such laws must always have proper safeguards for the security of private rights.

12. It is within the power of the legislature to declare the possession of spirituous liquors, for the purpose of sale, a *quasi* nuisance, and to provide a well guarded system of suppression of its use; and that possession shall be *prima facie* evidence of unlawful intent. But in making such changes the utmost care should be observed so as to preserve the sacredness of the domicil.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge presiding.

Messrs. CRAIG & HARVEY, for the appellant.

Messrs. WILLOUGHBY & GRANT, for appellee.

Mr. JUSTICE THOROTON delivered the opinion of the Court:

We propose only to consider the character and validity of the section of the charter, and the ordinances read in evidence.

The warrant issued commanded the officer to search the dwelling and out-houses of the accused, and if spirituous liquors were found to seize the same and bring them before the magistrate.

The ordinance greatly transcends the power granted to the council.

The charter empowered the council to declare the selling, giving away, or the keeping on hand for sale, of any spirituous or in-

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toxicating liquors, ale, beer, or any kind of fermented liquors *within the city*, a nuisance.

The necessary import and plain construction is, that the liquors must be kept to sell within the city. It could never have been intended to prohibit the possession of liquors within the city, designed for sale elsewhere.

The corresponding sections of the ordinance are:

"*Sec.* 3. If any person shall, within the city, keep on hand for sale, any spirituous liquors," etc.

"*Sec.* 4. Whenever complaint, on oath, shall be made before the police magistrate that any person within the city, has, in his, her or their possession, any intoxicating liquors," etc.

It will be seen at a glance that the ordinance exceeds the power conferred. Possession within the city, without any intention of selling therein, is made the offense.

There is as great a divergence between the charter and ordinance in regard to the search warrant.

The charter only contemplated a search in the event that liquors were in the possession of some person, for sale within the city.

The ordinance plainly authorized the search and seizure if the liquors were kept in the city, whether the intention was to sell them, or ship them and sell elsewhere.

The commission man might have, upon storage, the liquors of his correspondent, for shipment to Chicago or St Louis, and for sale there, and yet his business house is not secure from an unreasonable search or the property from unreasonable seizure and, it may be, confiscation. If the city of Onedia was of sufficient importance to make it a place of deposit for large quantities of liquors intended for shipment to other States and territories, though imported and in the original packages, the ordinance would interfere with commerce between the States, and it might be with foreign commerce. But confine the operation of the ordinance to the ordinary traffic between Oneida and its neighboring towns and cities, and it is unjust and illegal.

It is apparent that the ordinance is *ultra vires* and void.

It may be said that, in the cases supposed, the party in possession may prove his innocence—may show the purpose to be law-

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ful. The law ought not to be guilty of such harshness and absurdity as to require a man to prove his innocence when there is not even the suspicion of guilt. The mere kindness and courtesy of a glass of wine to a friend may constitute a nuisance and be visited with severe punishment.

That the legislature may prohibit the retail of intoxicating liquors has been often decided by this court; but this charter has taken a long step in advance of all previous legislation. It empowers the council to license, regulate and tax the sale of spirituous liquors; to declare the sale, and the keeping on hand for sale, a nuisance; to provide for its summary abatement and suppression; and it confers the power upon the police magistrate to issue warrants commanding the search of the premises of persons suspected of selling. Then it makes the mere possession *prima facie* evidence of unlawful intent; and, without satisfactory explanation, sufficient evidence of a sale and of keeping on hand for sale.

By the ordinance, the possession for sale may be adjudged a nuisance, and upon complaint that any person has in his possession, for the purpose of sale, intoxicating liquors exceeding in quantity one gallon, a warrant shall issue for the search of his dwelling house, and if the liquors are found they shall be seized and the person arrested, and both shall be brought before the magistrate, who shall immediately proceed to try the person, and if he should not offer to the justice a *satisfactory explanation* and show that he had the liquors for a *lawful purpose*, he shall be found guilty of a nuisance and fined, and ordered to the common jail until the fine and costs are paid; and the liquors seized shall be ordered to be sold on execution as other property, and the proceeds shall be applied to the payment of the fine and costs.

One remarkable feature of the ordinance is, that while seemingly intended for the abatement of a designated nuisance, it really maintains it. Blackstone says, a nuisance is anything that worketh hurt or damage. The nuisance aimed at in this instance must be termed of a public character as affecting public morals. It must have been regarded as noxious and injurious to the public welfare. Yet the council, while bitterly denouncing the offensive thing upon paper, made no provision for its destruction, as a due regard to the public morals required. On the contrary, the liquors are recog-

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nized as property; a sale of them may be ordered; a transfer is made to the possession of another; and then a new search will probably begin; or, will the sale change the nature of the liquors and expurgate their hurtful qualities? It would seem to an ordinary mind that, if the article is so great a nuisance as to require such summary proceedings for its suppression, the sale of it by the officer should likewise be considered a nuisance which ought to be suppressed.

Another serious objection to both charter and ordinance is, that they direct the seizure of all the liquors which may be found, and that all shall be sold. There is no limitation upon the action of the officers or of the exercise of the right of seizure. The fine can not exceed $100, yet liquors may be seized of the value of thousands of dollars. In this case, liquors of the value of $500 were taken. The judgment rendered was *in personam* for $50, yet property, ten times the amount, might be ordered to be sold for its satisfaction. The only cause for the sale must be for the satisfaction of the judgment, for we can not suppose that a sale would be ordered merely for the exercise of unusual and arbitrary power.

Who appropriates the surplus after the payment of the judgment? In justice it should be returned to the owner, but it is not so provided.

The constitution of 1848 prohibited justices of the peace from trying any person punishable by fine above $100. Though the accused in this case could not be fined in an amount exceeding $100, yet he might virtually be punished by deprivation of his property to the extent of $500.

Thus an inferior officer, limited in jurisdiction and in knowledge of the law, is authorized to adjudicate in reference to an unlimited amount of property. The seizure of the property permitted is unreasonable, and in violation of the Declaration of Rights.

A frequent recurrence to certain fundamental principles is essential to the preservation of good government, and to the security of the liberty and personal rights of the citizen.

Every man has the right to acquire and protect his property; to be secure against unreasonable searches and seizures; to a fair trial according to the course of the common law, before he can be

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deprived of life, liberty or property; and in all criminal prosecutions the right to be heard, to demand the nature and cause of the accusation against him, and to meet the witnesses face to face.

By the system of measures devised by the charter and ordinance, the citizen may be deprived of property without notice; condemned without witnesses; his premises subjected to an unreasonable search, and his property, to an unlimited amount, seized.

Spirituous liquors, ale and beer, are property, as much so as money or lands. They are chattels; are articles of consumption and of commerce. The ordinance recognizes them as property and directs their sale on execution, and permits druggists to keep them. Their abuse may be restrained, and punishment inflicted upon those who sell them to the injury of others. They may, as well as other chattels, come under the designation of nuisance, and, to a certain extent, lose their quality as property; but they can not, *per se*, lose their quality as property.

The charter permits their seizure without any notice to the owner. The ordinance is but a slight, if any, improvement. It authorizes the seizure of the liquors and the arrest of the person. But if he is not found, no notice, actual or constructive, is provided for.

If the person be arrested, upon the trial—if it deserve the name—the prosecution need prove nothing; need not produce any witnesses to undergo the ordeal of cross-examination. The complaint under oath, and the exhibition of the liquors in court, make out a *prima facie* case. The accused must then submit, or prove that he kept the liquors for a lawful purpose. His guilt is a presumption of law unless he proves his innocence. The *ex parte* proceedings of the officers condemn him unless he can make a satisfactary explanation. Thus the rule is reversed, that no man can be required to explain until sufficient proof is offered to warrant a just and reasonable conclusion against him.

It is no excuse that there was a trial in this case. This only proves that the prosecution was more tolerant than it might have been. We must look at the stringency of the law. A bad law is none the better because it is not rigidly enforced.

The last clause of section 22 of the charter is still more ob-

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noxious; not on account of a change in the rules of evidence, but for other reasons.

The legislature may change the law and increase the presumptions of guilt. It may, to a certain extent, make acts evidence of an unlawful intent which had before been innocent. It may declare the possession of certain articles of property, on account of their highly dangerous character, unlawful. But such laws must always have proper safeguards for the security of private rights.

To lessen and prevent the evils of intemperance and the innumerable ills flowing therefrom, it is within the power of the legislature to declare the possession of intoxicating liquors, for the purpose of sale, as *quasi* a nuisance, and provide a well guarded system for the suppression of their use, and to enact that such possession shall be *prima facie* evidence of unlawful intent.

However we may regret the modification or abandonment of the wise principles of the common law which have, for ages past, afforded ample protection to life, liberty and property, the propriety of such action must be left to legislative wisdom and discretion.

But in making such changes, the utmost care should be observed so as to preserve the sacredness of the domicil.

There can be no justification for the search which is authorized by the charter. Possession is declared to be evidence of unlawful intent; hence, the possession is unlawful. Unlawful possession justifies the search and seizure; therefore the mere possession justifies the search. Without actual sale—without the overt act—without even intent, in fact, to violate the law—the sanctity of the domestic circle is violated by an odious search.

For cause so trivial the privacy of the citizen can not be invaded and his house ransacked from cellar to garret. If this can be done, the rampart which the constitution has built up to secure the hearthstone from rude intrusion, is an effectual defense no longer. The search provided for is odious and unreasonable, and in conflict with the Declaration of Rights.

The judgment must be reversed and the cause remanded.

Judgment reversed.

A town or city, cannot give its ordinances extra territorial effect, except so far as it may be clearly authorized so to do by the legislature. *Straus* v. *The Town of Pontiac*, 40 Ill. 301. See also, *Neifing et. al.* v. *Town of Pontiac*, 56

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Ill. 172. It must be remembered that there is a limitation on the power of the legislature to delegate authority to a town or city, and that such town or city can only exercise such power as shall be constitutionally delegated. A town or city can do nothing beyond the express or implied power delegated by the legislature. The power to prohibit a tippling house or a dram shop cannot be considered as embracing the power to prohibit the sale for domestic use, of a cask of beer, *Straus* v. *The Town of Pontiac, supra;* that the legislature has power to authorize towns and cities to restrain and entirely prohibit the sale of intoxicating liquors is sustained by authority. See *Block* v. *The Town of Jacksonville*, 36 Ill. 301; 31 Ill. 88; 40 Ill. 301; 56 Ill. 172; 50 Ill. 39. In the case of *Commonwealth* v. *Intoxicating Liquors*, 107 Mass. 396, it was held under the Statute of that State passed in 1869, chap. 415, that intoxicating liquors kept for sale in the State in violation of the Statute may be seized and forfeited as a nuisance, although they are kept by a bailee, in fraud of the rights of the true owner, and in a case of same title in same vol. p. 386, it was held that intoxicating liquors intended to be sold in violation of the Statute of 1869, by a person in whom they are in course of transportation with reasonable cause on the part of the carrier to believe that such is his intention, are liable to be seized and forfeited under that Statute. A complaint under the same statute averred that certain intoxicating liquors were kept by John Cohill, of Boston, "in a certain building situate on Blackstone street, and numbered one hundred and fifty-two on said street, in said Boston, and the first floor of said building, occupied by said Cohill as a place of common resort therein," and praying for a warrant to search "said first floor of said building." The jury were instructed that if they were satisfied upon the evidence, that the premises were a shop for the sale of intoxicating liquors, open to the public, to which the public had free ingress, for the purpose of purchasing such liquors, they would be warranted in finding that it was a place of common resort. And the Supreme Court say: "As it was in evidence not only that it was open to the public, but that parties went there without restriction, and that intoxicating liquors were sold there, there was no error in such an instruction. *Com* v. *Lynn*, 107 Mass., 214; see also, in same vol., *Com* v. *Cogan*, p. 212, *Com* v. *Pierce*, 487, *Leslie* v. *Com*, p. 215, *Com* v. *Jenning*, p. 488; see also, *Orcott* v. *Symonds*, p. 382, which was a suit to recover back money paid for spirituous liquors under the statute. The court held, "The purchaser of intoxicating liquors sold in violation of law, is not *in pari-delicto* with the seller. The money paid by the purchaser to the seller is declared by statute to be held without consideration, and against law, equity, and good conscience, Gen. St., c. 86, § 61. It remained, therefore, the property of the purchaser, and might be recovered back as such, *Walen* v. *Kirby*, 99 Mass. 1; *Adams* v. *Goodnow*, 101 Mass., 81. It makes no difference, that the plaintiff gave his promissory note for the price, it was held that if he had paid the notes to the defendant, or to his use, he might recover back the same, see also in same vol. p. 121, *Boiduc* v. *Randall*. The cases above cited in Mass., are cases where the power was exercised by the State, and are cited for the purpose of illustrating, if possible, the distinction between the exercise of the power of search by a State and a municipal corporation. The municipal corporation can only act in the manner authorized by the legislature, and the legislature is only restrained by the State and National

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constitutions. If the right of search is not delegated by the legislature to the city, by the charter, it is clear the city cannot exercise the right of search, nor can a city confiscate a man's property, except by due process of law. In no case can a city or town exceed its chartered powers. A strict observance of chartered powers, that are clearly within the constitutional power of the legislature to delegate, on the part of municipal corporations, will give dignity to their authority, and their local legislation will command the respect of all. A charter in conformity to the constitution is the chart of authority of a city or town council, and any attempt to go beyond the chartered powers will not be sustained by the courts. It has been held that a proceeding to collect a penalty for the violation of a town ordinance, is a civil suit, and that such penalty cannot be recovered in any criminal proceeding, *Hoyer, et al* v. *The Town of Mascoutah*, 59 Ill., 137. It has also been held that the proceeding to enforce a penalty was a civil proceeding, and that the defendant should be allowed to testify, and that it is not material that the party was subject to indictment for the same offense. A license to retail spiritous liquors is not a contract between the State or municipality and the retailer, *Colder* v. *Kerly*, 5 Gray, 597; *Com.* v. *Brennan*, 103 Mass., 70; *Metropolitan Board of Excise* v. *Baine*, 34 N. Y., 667; see also *Freleigh* v. *The State*, 8 Mo., 606; *State* v. *Hawthorn*, 9 Mo., 389, 8 Mo., 697. But see, contra, *Adams* v. *Hackett*, 7 Foster, N. H., 289; see also *Boyd & Jackson* v. *State*, 46 Ala. 329.

That towns and cities have the power, within chartered limits to control, license, suppress, and prohibit dram shops, cannot now, I apprehend, be questioned. See also *Streator* v. *People*, Post p. 85.

A license to retail spirituous liquors can only be issued to take effect in the future, and cannot lawfully be anti-dated. *Brown* v. *State*, 27 Tex. 335.

Supreme Court of Alabama.

CURMBLEY *v.* SEARCY, 46 ALA. 328.

PLEA WHAT DEMURABLE.

In a suit against one of the makers of a promissory note, a plea by the defendant that his co-maker, was at the time of making the note a married woman, and principal in said note, and that he signed it as her surety, is subject to demurrer, so also, is a plea that the consideration of the note was the hire of a slave.

Appeal from Henry Circuit.

Shorter & McElroy, for appellant.

W. C. Oates, contra.

The opinion of the court was delivered by

SAFFORD, J.—In a suit upon a promissory note against one of the makers, a plea by the defendant that his co maker was a mar-

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ried woman at the time, and that he signed it merely as her surety is subject to demurrer. The obligation is several as well as joint, and the plea of coverture is a defense, *Gibson* v. *Marquis*, 29 Ala. 668; *Hall* v. *Canute*, 22 Ala. 650; 1 Parsons on Notes and Bills, 244; 30 Vermont 122. A plea that the consideration of the note was the hire of a slave, is also bad. *Model* v. *McElvain*, January Term, 1870.

The judgment is reversed and remanded.

The first section of the act of the legislature of this State entitled, "Husband and Wife," in force July 1st, 1874, provides, "That a married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced by or against her, as if she were a single woman."

This provision of the Statute will in this State, upon all contracts made on and after July 1st, 1874, debar any married woman of the right of filing the plea of coverture. Promissory notes are made jointly and several in this State by Statute, and so held by our Supreme Court in the case of *The Marine Bank of Chicago* v. *James H. Ferry's administrators*, 40 Ill. 255, and the same ruling I have no doubt would be made by our Supreme Court that is made in the principal case, in other words the party signing as surety for a married woman becomes liable in case of default of payment by the principal, to be sued separately and upon all contracts made after July 1st, will be liable to be sued jointly with such married woman, or separately as the plaintiff may elect. As to the liabilities of married women on contracts under the act of 1861, see *Cookston* v. *Toole*, 59 Ill. 515. In cases where a married woman under the law may file a plea of coverture, and her right to have a default set aside, see the case of *Albree et. al.* v. *Maria E. Johnson*, Legal News, vol. 6, page 296, decided by WELKER, J., Northern District of Ohio. In this case a judgment had been entered by default and the defendant moved to set aside the default, on the ground that she was a married woman at the time of the commencement of the suit, and it was there held that the coverture of the defendant at the commencement of the suit, was a question of fact, that might be remedied by writ of error *coram nobis*, and be reversed on such writ; and that the same end could be obtained by a motion supported by affidavit, at any time before the satisfaction of the judgment, and during the existence of the coverture, so that it would seem that unless a married woman would be liable upon the principles announced in the case of *Cookston* v. *Toole*, *supra*, the proper practice would seem to be to sue the security alone, as was done in the principal case—upon all contracts heretofore made or that shall hereafter be made prior to July 1st, 1874.

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Supreme Court of Illinois.

DOUGLAS STREATOR, Plaintiff in Error *v.* THE PEOPLE, Defendants in Error.

1. It is a rule when the legislature adopts substantially the statute of another State, it is presumed it adopts also the construction previously given by the courts of that State, unless such construction is inconsistent with the spirit and policy of our laws affirming, *Riggs, et als,* v. *Wilton,* 13 Ill., 15; *Campbell* v. *Quinlan,* 3 Scam., 288.

2. That the clause of the third section of the Liquor Law of 1872, which declares that all places where intoxicating liquors are sold in violation of the act, to be common nuisances and shall be shut up and abated, does not authorize a destruction of property.

3. The first section of the act construed to prohibit the sale of liquors without a license.

4. That the object of the act is to prevent the assembling of idle and evil disposed persons for the purpose of violating the law of the State legislature.

5. That under the police power of the State, the legislature may authorize the abatement of a public nuisance, add the carrying on of an illegal traffic in intoxicating liquor is a nuisance, and may be so declared and abated.

6. A law that applies to and confers the same general powers on all incorporated towns and cities in the State is not necessarily a special law, and is not inhibited by any provision of the constitution against special legislation.

The opinion of court was delivered by

SCOTT, J.—This was a prosecution commenced before a justice of the peace against the appellant for selling intoxicating liquors without a license.

The justice found him guilty, and assessed a fine of $20, and rendered judgment accordingly.

On an appeal taken to the circuit court the cause was submitted on an agreed states of facts, and the court *pro forma* found the appellant guilty and entered judgment against him of $20 and costs of suit.

From the statement of facts, it appears the appellant resides near the city of Ottawa, La Salle county, but not within the limits of any incorporated town or city.

That he has never given the required bond and obtained license to keep a grocery as required by the first section of an act entitled "An act to provide against the evils resulting from the selling of intoxicating liquors in the State of Illinois." Approved Jan. 13, 1872, and at his residence, as stated, he has repeatedly sold intoxicating liquors in less quantity than one quart, to any person

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who desired to purchase to be drunk on his premises, by the glass, and the liquors so sold were drunk by the persons purchasing.

It is provided in the first section of the act under which this prosecution was commenced, it shall be unlawful for any person not having obtained a license to keep a grocery to sell in any quantities intoxicating liquors to be drunk on the premises where sold, or in any adjoining room, or any place of public resort connected therewith, and no person shall be granted a license without first giving a bond to the municipality, or authority authorized by law to grant license, in the penal sum of three thousand dollars, with two sufficient securities, which bond shall be conditioned and for the purpose as therein directed.

The second section provides, it shall be unlawful for any person to sell intoxicating liquors to minors unless upon the written authority of their parents or guardians or family physician, or to persons intoxicated, or who are in the habit of getting intoxicated,

In the third section it is provided, all places wherein intoxicating liquors were sold in violation of the act shall be taken, held, and declared to be common nuisances, and all such places shall be shut up and abated, on the conviction of the keeper thereof.

The sixth section declares what penalties shall be inflicted on the persons violating the provisions of the first and second sections of this act.

The admitted facts show a clear violation of the first section of the statute, but not of the second.

It is insisted a conviction cannot be maintained unless the evidence shows a violation of the *first* and *second* sections.

The objection seems hypercritical. It is founded on the peculiar phraseology of the sixth section imposing the penalties, and which provides that every person guilty of violating the provisions "of the first and second sections" shall forfeit and pay certain penalties.

The penalties imposed by that section are for the violation of either section, and it is not indispensable a party should be guilty of both before he can be subjected to the forfeitures enumerated.

This is the obvious meaning of the words used, and is the construction given to the same language in the statute of Ohio on the same subject (in Miller vs. The State, 3 Ohio, 475).

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Our statute in many respects is a substantial, and in other points a literal, transcription of the Ohio law, and it is a rule that when the legislature adopts substantially the statute of another State, it is presumed it adopts also the construction previously given it by the courts of that State, unless such construction is inconsistent with the spirit and policy of our laws (Riggs et al, vs. Melton et al, 13 Ill., 15; Campbell vs. Quimin, 3 Scam., 288). It is urged the clause of the third section which declares all places where intoxicating liquors are sold in violation of the act to be common nuisances, and shall be shut up and abated, authorizes the destruction of private property, and therefore contravenes constitutional law.

The construction of this section is not involved directly in the decision of this case. Counsel, however, is in error in supposing it authorized the summary destruction of private property.

It authorizes no such thing.

It simply declares all such places where intoxicating liquors are sold in violation of the act common nuisances, and provides that they may be shut up and the illegal traffic carried on therein abated.

The object is to prevent the assembling of idle and evil-disposed persons for the purpose of violating the laws of the State. Under what is called the police power, the legislature has the right to authorize the abatement of a public nuisance and the carrying on of an illegal traffic in intoxicating liquors and vicious poisons for that purpose is a nuisance, and may be so declared and abated according to law.

(Block vs. The Town of Jacksonville, 36 Ill., 301, and cases cited).

There is nothing in this clause of the third section that we are aware of that contravenes any provision of our constitution.

The same construction has been given to a like provision in the Ohio statute in Miller vs. The State supra.

The point which seems to be relied on with the most confidence is, the act is in conflict with that clause of the twenty-second section of the fourth article of the constitution of 1870, which prohibits the passage of local or special laws.

"Granting to any corporation or individual any special or ex-

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clusive privileges, immunity, or franchise whatever." The reason assigned is the act of 1853, which purports to re-enact the laws which have been repealed by the act of 1851. That authorized county authorities to grant license to keep a grocery was never legally enacted according to the forms prescribed in the constitution of 1848, and there was therefore no law in force at the passage of the act of 1872, authorizing the granting of license other than the charters of incorporated towns and cities, and hence it is said a person residing outside of the limits of such municipal corporations could not obtain a license, and for that reason the law operates unequally on the cities and is void.

It is not perceived how this question can arise in this case.

There is a statute that invests the county authorities with a discretionary power to grant licenses to keep a grocery anywhere in the county—except in towns and cities that under their charters have the exclusive privilege, which has been in existence since 1845, exclusive of the interval between the passage of the acts of 1851 and 1853.

The apellant does not claim he ever applied to the authorities empowered by law to grant license for himself.

Had the application been made and a license denied on the ground there was no law that would authorize it, then the questions would be presented for decision.

We are, however, of opinion the validity of the present law is not affected by the question, whether the act of 1873, which purports to re-enact the laws repealed by the law of 1851, was legally enacted according to the forms of the constitution, and it is not necessary to express an opinion in regard to it.

If it is, in fact, true, at the date of the passage of the act of 1872, there was no law under which a person residing outside the limits of incorporated towns and cities could obtain a license to keep a grocery, it does not follow, the law for that reason is uncontitutional.

The act we are considering, in nearly all its provisions, is general and operates equally upon all classes of citizens within the limits of the State.

The first section prohibits all persons from selling intoxicating liquors who have not first cbtained a license as therein provided.

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The appellant is within this general prohibition.

The second section prohibits the sale of such liquors to minors without the written consent of the parents, guardians, or family physician, and contains an absolute restriction upon all persons, either with or without license, from selling intoxicating liquors to intoxicated persons, or persons who are in the habit of getting intoxicated.

If it be conceded the power to grant a license to keep a grocery is confined to incorporated towns and cities, which by their charters have the right to do so, is the law for that reason unconstitutional? We think not. Confessedly this sale of intoxicating liquors to be drank as a beverage is a fruitful source of crime in our midst, and the cause of much individual suffering. If such are its fruits when hedged about with penal statutes, intended to control it, manifestly the unrestrained traffic would be prolific of results that could not be otherwise than detrimental to the best interests of society. It may be the best mode to effectuate the beneficent object the legislator have in view in the passage of the law, viz: to provide against the evils resulting from the sale of intoxicating liquors, to confine the power to license the sale to incorporated towns and cities, where it is supposed the police force is more efficienly organized and can better control it.

It concerns the public morals, good order, and the welfare of society, and we are not prepared to hold that it is an unauthorized exercise of the police power of the State to so provide. A law that applies to and confers the same general powers on all incorporated towns and cities in the State, is not necessarily a special law, and is not inhibited by any provisions of the constitution against special legislation. *Hetkin* v. *Pollard*, *et al.*, 18 Ohio, 85.)

Being of the opinion the law under which the prosecution was commenced is not in conflict with the constitution of the State, the judgment of the circuit court must be affirmed.

Judgment affirmed.

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Supreme Court of Illinois.

JOHN F. McCUTCHEN, Plaintiff in Error v. THE PEOPLE OF THE STATE ILLINOIS, Defendants in Error.

1. The second section of the liquor law of 1872, laws of 1872, p. 553, makes it absolutely unlawful, notwithstanding the party may have a license obtained under the provisions of the first section of the act to sell intoxicating liquors to minors, unless upon the written order of the parents, guardians, or family physician, and contains an absolute restriction upon selling such liquors to persons intoxicated, or who are in the habit of getting intoxicated.

2. Where the legislature adopts substantially the statute of another State, it is presumed to adopt also, the construction previously given it by the courts of that State, unless such construction is inconsistent with the spirit and policy of our law affirming *Streeter* v. *People*, *Ante.*

3. The construction given to the Ohio statute upon this question cannot but be regarded as being inconsistent with the spirit and policy of our laws, and no presumption prevails that in adopting it the legislature also adopted the construction that had previously obtained in that State.

4. Under our statute, every indictment or accusation of the grand jury is sufficiently correct, which states the offense in the language of the criminal code, or so plainly, that the nature of the offense may be easily understood by the jury.

5. Where the intent is mentioned in the statute as an element of the offense, the intent must be alledged in the indictment, but where the statute is silent as to motive, no intent need be averred in the indictment.

6. The presumption should be indulged that the present statute was inacted in the view of existing laws as construed by former decisions of the Supreme Court.

7. The license procured under the first section of the act confers no authority on the licensee to sell intoxicating liquors to a minor except on one condition, viz: He shall have a written order of his parents, guardian or family physician.

8. The same section absolutely prohibits the selling of such liquors to persons intoxicated or in the habit of getting intoxicated, and the license obtained under the first section will afford no protection.

9. The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge he does it at his peril.

10. If the seller does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale; and it is no answer to this view that the seller may be imposed upon. This is a risk incident to the business.

11. It was not deemed a material inquiry whether the sale in this case was made by appellant, his agent, or servant. In either case the principal is guilty within the meaning of the statute. The agent must sell in the name of his principal, and the presumption must be deemed conclusive against the principal that the agent or servant acted within the scope of his authority in making the sales.

12. Waker and M'Callister, J. J. dissent.

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The opinion of the court was delivered by SCOTT, Justice.

"This was an indictment found against the plaintiff in error, for unlawfully selling intoxicating liquors to a minor without the written order of his parents, guardian, or family physician, contrary to the form of the statute.

The indictment was certified to the county court, where a trial was had, and the accused found guilty, and upon an appeal taken to the circuit court, the judgment was affirmed.

A motion was made in the county court to quash the indictment, for the reason that it was not averred that the accused knew Jay Parker, to whom it was alleged the intoxicating liquors were sold, was then a minor. The decision of the court, overruling the motion to quash the indictment, is assigned for error.

This prosecution was commenced under the 2d section of the act of 1872, in relation to the sale of intoxicating liquors, which provides, "that it shall be unlawful for any person, by agent or otherwise, to sell intoxicating liquors to minors, unless upon the written order of their parents, guardian or family physician, or to persons intoxicated, or who are in the habit of getting intoxicated." (Laws of 1872, p. 553.)

The indictment is substantially in the words of the statute. This action makes it absolutely unlawful, notwithstanding the party may have a license obtained under the provisions of the first section of the act, to sell intoxicating liquors to minors, unless upon the written order of the parents, guardians or family physician, and contains an absolute restriction upon selling such liquors to persons intoxicated, or who are in the habit of getting intoxicated. It is claimed that the indictment is fatally defective, inasmuch as it fails to aver that the defendant knowingly sold liquors to minors. It is insisted that guilty knowledge is absolutely necessary to constitute the offense, and unless the scienter is averred, it cannot be proven on the trial. The principal authority relied on in support of this proposition is in the case of *Miller* v. *The People*, 3 Ohio, 47. This act of our statute is no doubt a substantial, if not a literal copy of the Ohio statute, on the same subject, and in construing it in the Miller case, the court said: "To convict for a violation of the

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second section, it is necessary to aver in the information, and prove on the trial, that the seller knew the buyer to be a minor."

Having adopted the statute of a sister State, it is claimed that the legislature adopted, also, the construction previously given it by the courts of that State. The rule on this subject is stated, as we understand it, in *Streator* v. *The People*, (present term.) The doctrine, as there announced, is that where the legislature adopts substantially the statue of another State, it is presumed to adopt also the construction previously given it by the court of that State, unless such construction is inconsistent with the spirit and policy of our laws.

The construction given to similar language in the Ohio statute cannot but be regarded as being inconsistent with the spirit and policy of our laws, and therefore no presumption prevails, that in adopting it, the legislature also adopted the construction that had previously obtained in that State. By our laws, every indictment or accusation of the grand jury shall be deemed sufficiently correct, which states the offense in the terms and language of the criminal code, or so plainly that the nature of the offense may be easily understood by the jury. (R. S. 1845, p. 181.)

Since the adoption of this statute it has uniformly been held that it was not necessary to do more than state the accusation in the language of the statute creating the offense. Where the intent is mentioned as an element of the offense created by a law, it ought to be alleged, but, where it is silent as to motive, no intent need be averred in the indictment. The case *Ells* v. *The People*, 4 Scam., 509, was an indictment for "harboring and sheltering" a slave. It was contended that the defendant, to be guilty of the offense, must have had knowledge of the fact that the person harbored and secreted was at that time a slave, and that this knowledge should be averred in the indictment and proved on the trial. It was not held, however, that in such an indictment it was not necessary to allege a scienter. The court commented on the case of *Birney* v. *The People*, 8 Ohio, 320, upon the authority of which the case of *Miller* v. *The People*, *supra*, was decided and disapproved of the doctrine there announced. The case of *Carmody* v. *The People*, 17 Illinois, 158, was an indictment for selling spirit-

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uous liquors in less quantities than one gallon, and the general averment of an illegal sale was held sufficient, the court saying that these great niceties and strictness in pleadings should only be countenanced when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge, and, beyond this, particularity of specification might furnish a means of evading the law, rather than defending against the accusation. To the same effect is *Morton* v. *The People*, 47 Illinois, 468.

In view of our statute, which makes it sufficient to set forth the offense in the indictment or information, in the language of the act creating it, so plainly that the nature of the accusation can be readily understood, and of the uniform construction given to it by our decision, it can hardly be said that the legislature, in adopting the statute of another State, intended also to adopt a construction in direct antagonism with our laws, and in conflict with the practice that has prevailed under them through a long series of years. It is at most a presumption, and is repelled when we remember that the construction contended for had been disapproved by this court long prior to this enactment of the law under consideration, upon the ground that it was inconsistent with our laws. The presumption should rather be indulged that the present statute was enacted in the view of the existing laws as construed by former decisions of the court. The latter is the more reasonable presumption, and we think should be adopted as being more consistent with the spirit and policy of our laws.

Independently of the question whether it is necessary to allege a scienter in the indictment, it is insisted that the act of selling intoxicating liquors to a minor is not itself made punishable by the statute unless the seller knew at the time that the buyer was a minor. We cannot concur in this view of the law. The license procured under the first section of the act, confers no authority on the licensee to sell intoxicating liquors to a minor, except on one condition, viz: He shall have the written order of his parents, guardian or family physician; he is absolutely prohibited by the same section from selling to a person intoxicated, or who was in the habit of getting intoxicated, and his license will afford him no protection. The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale

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without this knowledge, he does it at his peril. This is the clear meaning of the law, and any other construction would render it exceedingly difficult, if at all possible, ever to procure conviction for a violation of this clause of the statute. This construction imposes no hardship upon the licensed seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale. It is made unlawful either with or without a license, to sell to a certain class of persons, and another class, except under certain conditions, and if he violates either clause of the statute, he must suffer the penalties imposed in its violation.

It is no answer to this view to say that the licensee may sometimes be imposed upon and made to suffer the penalties of the law, when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and as he receives the emoluments connected therewith, he must assume also, with it, all the hazards. Our laws make it a crime for a man to have carnal intercourse with a female under a certain age, either with or without her consent. It would shock our sense of justice to hold a party not guilty because he did not know that she was within that age prescribed by the statute. The law makes the act a crime, and infers the guilty intent from the act itself.

The case of the *Commonwealth* v. *Emmons*, 99 Mass., was a prosecution against a keeper of a billiard room for admitting a minor thereto without the consent of the parent or guardian. It was held that it was not needful to even prove the guilty intent of the defendant, and that he admitted such persons to his room at his peril. In *Ulrich* v. *The Commonwealth*, 1 Bush (Ky.), 400, under indictment for selling liquors to a minor, it was held that it was as incumbent on the vender to know that his customer labors under no disability, as it is for him to know the law.

The State v. *Hatfield*, 24 Wis., was also an indictment for selling liquors to a minor. It was held it was an offense under the statutes of that State, notwithstanding the vender did not know that the purchaser was a minor.

Barnes v. *The State*, 19 Conn., 397, was a prosecution for selling liquors to a common drunkard, and to sustain the prosecution it was declared not to be necessary to prove that the defendant

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knew the person to whom the liquors had been sold was a common drunkard.

The evidence shows conclusively that Jay Parker, at the time he purchased intoxicating liquors at the counter of the defendant, was a minor, and that he had no written order from either of his parients, his guardian, or family physician. Whether the appellant knew he was a minor, in the view we have taken of the law is wholly immaterial. It was his business to know whether he could lawfully sell to him.

We do not deem it a material inquiry whether the sale of the liquors in this case was made by appellant, his agent, or servant. In either case the principal is guilty within the meaning of the statute, and is liable to the penalties it imposes. The agent had no license to sell to any one, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption must be deemed conclusive against the principal, that the agent or servant acted within the scope of his authority in making the sale.

The instructions given at the trial are not so varient from the principles announced in this opinion as to have misled the jury. The fourth instruction may have been wrong in its phraseology, but it is not perceived how it could have worked any injury or prejudice to the plaintiff in error.

No error appearing that could affect the merit of the cause, the judgment is affirmed. Judgment affirmed.

JUSTICE CRAIG, having been counsel for the defendant in the court below, took no part in the consideration of the case.

WALKER and MCALLISTER, J. J., dissent. We are of opinion that while it is not necessary to aver guilty knowledge in the indictment under our statutory rule, and that an indictment is sufficient which charges a statutory offense in the language of the statute, but it is nevertheless necessary to prove such guilty knowledge n the trial. The statute is but a copy of the Ohio statute, to which the courts of that State had, long anterior to its adoption here, given such a construction as we contend for. The presumption is that the legislature adopted it with the construction given, and intended that the essential element of guilty knowledge or intent, which is the essence of every crime, should enter into that here defined.

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The following forms are prepared relative to the liquor law of 1874, Myers statute 1874, p. 213, for selling in less quantity than one gallon : &c.

STATE OF ILLINOIS, } ss.
.... COUNTY, }
Of the......... Term of the.........County Circuit Court, in the year of our Lord One Thousand Eight Hundred and Seventy..........

The grand jurors, chosen, selected and sworn in, and for the county of........., in the name and by the authority of the People of the State of Illinois, upon their oaths present, that one A. B., late of said county ,on the.........day of.........in the year of our Lord One Thousand Eight Hundred and Seventy........., at and within the said county of........., (*) not then and there having a legal license to keep a dram shop did unlawfully sell a certain quantity less than one gallon, to-wit: one gill, of intoxicating liquor: contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

For selling to be drank on premises. (*use above form to the* (*) *and proceed thus*:)
not then and there having a legal license to keep a dram shop did unlawfully sell intoxicating liquor to be drank *upon the premises where sold* (*or if sold to be drank in or upon any adjacent room, building, yard, premises, or place of public resort, then state the place according to the fact*); contrary to the form of the statute, etc.

For selling or giving to a minor
(*use first form to* (*) *and continue thus*: did unlawfully *sell* (*or give, as the case may be*) intoxicating liquor to one C. D.; he the said C. D. being then and there a minor, under the age of twenty-one years, to-wit: of the age of *eighteen* years, without then and there having a written order of the parent, guardian, or family physician of the said C. D.,) authorizing, or permitting such sale; contrary to the form of the statute, etc.

For selling or giving to an intoxicated person
(*first form to* (*) *and continue thus*:)
did unlawfully *sell* (*or give as the case may be*) intoxicating liquor to one E. F., he the said E. F. being then and there intoxicated; contrary to the form of the statute, etc.

For selling or giving to a person in the habit of getting intoxicated
(*first form to* (*) *continuing thus*:)
did unlawfully *sell* (*or give as the case may be*) intoxicating liquor to one G. H., he the said G. H. being then and there a person in the habit of getting intoxicating; contrary to the form of the statute, etc.

It is believed that the above precedents prepared by the Hon. Joseph W. Fifer, State's Attorney of McLean county, under the act of 1874, will greatly assist the prosecuting attorneys throughout the State in the preparation of indictments under the law to take effect July 1st, 1874. It will be noticed that by the act of 1874, that it is made unlawful to sell in any quantity less than one gallon whether to be drank upon or about the premises or not; and that it is made unlawful to sell in any quantity to be drank upon or about the premises where sold, without having first obtained a license as provided in the act, see sect. 2 of the act, and that by section six it is provided, that "whoever by himself or his agent or servant shall sell or *give* intoxicating liquor to any minor without the written order of his parents, guardians, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall for each offense, be fined not less than twenty dollars, nor more than one hundred dollars, and imprisoned in the county jail not less than ten, nor more than thirty days.

This section under the rule laid down in the case of *McCutchen* v. *The People*, makes it absolutely unlawful for any person to sell or give away any intoxicating liquors to a minor without permisson, &c., and unlawful to sell or *give* any intoxicating liquors to any intoxicaed person, or person in the habit of getting intoxicated, under any cirunmstances.

The statute requires the authority to sell or *give* to a minor to be in writing.

In the case of *The State* v. *Clottu*, 33 Ind., 409, it was held by the Supreme Court of that State under a statute forbidding sales to minors that it was no defense to an indictment for selling intoxicating liquors to a minor, that the father authorized the sale to be made by the defendant to the minor, and our statute requires the authority to be in writing, and parties can not authorize a sale by parol that will be a bar to a prosecution under the law.

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THE

MONTHLY

WESTERN JURIST.

JULY, 1874.

INSTRUMENTS REFERRING TO EXTRINSIC FACTS. INSTRUMENTS REFERRED TO MUST BE IDENTIFIED.

In general a written instrument must be construed by the provisions contained in it, and not by anything *dehors;* but the acts of the parties may be considered in order to ascertain their intention. But to this general rule there are exceptions. It has been uniformly held in equity, and in numerous cases at law, that where several instruments in writing are made at the same time between the same parties and relating to the same subject, will be held to constitute but one agreement, *Stephens* v. *Baird*, 9 Cow., 274; *Makepeace* v. *Haward College*, 10 Pick, 302; *Sibley* v. *Holden*, 10 Pick, 250; *Hunt* v. *Livermore*, 5 Pick, 395; *Applegate* v. *Jacoby*, 9 Dana, 209; *Strong* v. *Barnes*, 11 Ver., 221; *Odvorne* v. *Sargent*, 6 N.H., 401; *Raymond* v. *Roberts*, 2 Aiken, 204; *Reed* v. *Field*, 15 Ver., 672; *Home Ins. Co.* v. *Favorite, et als*, 46 Ill., 23; *Duncan, et als* v. *Charles*, 4 Scam., 561; *Harper* v. *Ely*, 56 Ill., 179; *Havens* v. *Sprague*, 1 Paine's Rep., 494; *Lowell* v. *Parkhurst*, 4 Wend., 377; *Bliss* v. *Bronham*, 1 J. J. Marsh, 200; *Swain* v. *Ransom*, 18 John R., 107. And in construing such contracts the court will presume such a priority in the execution of them as will best effect the intent of the parties, *Newhall* v. *Wright*, 3 Mass., 138. Where one of the contracts is full and explicit as to the intent and meaning of the parties, and the

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other general, but referring to and adopting the stipulations contained in the former, the courts in giving a construction to the agreement of the parties, both instruments will be considered as forming but one agreement, *Rogers* v. *Kneeland*, 13 Wend., 114; *Adams* v. *Hill*, 4 Shepley's Maine, 215; see also 3 Shepley, 40. Upon the same principle where one writing refers to another, either tacitly or expressly, both are to be construed together, and one may correct an erroneous description contained in the other, *McIver's Lessee* v. *Walker*, 4 Wheat., 444. In *Sawyer* v. *Hammott*, 3 Shepley, 40, it was held that when written instruments have reference to a former contract, and contain recitals of its subject matter, and it appears that there is a variance between such instruments, and between them and the contract, the recitals are to be explained and corrected by the contract, to which reference is made. As to when and how far a written application for insurance may be considered, see *Parks* v. *The General Interest Ins. Co.*, 5 Pick, 34, and if the application is clearly referred to, the application and policy should be read together, as forming the agreement between the parties. Two writings executed at the same time in relation to the same subject matter have, in many cases, been deemed one instrument, with a view to the construction of either. That they are cotemporaneous and kindred in respect to the subject matter is frequently inferrable from circumstances appearing in the writings themselves. Though neither expressly and directly refers to the other, yet being in fact parts of one transaction, bearing the same date and the same subject matter, the one will often qualify the other, and the whole be deemed one agreement. A familiar instance is that of a conveyance of lands or chattels, apparently absolute, and a separate cotemporaneous agreement respecting a conveyance by a grantee to the grantor, on payment of a sum loaned, &c., in such case both instruments, if made at the same time, are to be construed together, and may be construed to be a mortgage, *Stacey* v. *Randal*, 17 Ill., 468; *Bennock* v. *Whipple*, 3 Fairfield, R., 346-349; *McDowell* v. *Hill*, 2 Bibb's R., 610. Yet there are cases where the agreements are simultaneous, the construction may be that the whole agreement when construed together instead of amounting to a mortgage, manifests a *defeasible purchase*, and then the question, how far parol evidence is admissible

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to show that a mere security or mortgage transaction was intended, frequently arises. Unless a contract contains technical terms, known and understood only by scientific persons, the court will construe the contract without the aid of witnesses, to explain its meaning, *McAvoy* v. *Long*, 13 Ill., 147. A conveyance of real estate though absolute in terms, if intended by the parties to be a security for the payment of a debt, is both at law, and in equity, regarded as a mortgage only, and the intention of the parties may be manifested either by a written defeasance, executed simultaneously with the conveyance, or by the acts or parol declaration of the parties, *Delehay* v. *McConnel*, 4 Scam., 157; *Coates* v. *Woodworth*,, 13 Ill., 654; *Miller* v. *Thomas*, 14 Ill., 428; *Tillson* v. *Moulton*, 23 Ill., 628. On this general doctrine, also see 4 Kent's Com., 143.

Robinson v. *Cropsey*, 2 Edw Chy. R., 138—142, and cases there cited, *Reading* v. *Weston*, 7 Conn. R. 143 S. C. Id. 409, 8 Id. 117, *Wharf* v. *Howell*, 5 Binn. 499, *Herr* v. *Gilmore*, 6 Watts R. 405, *Calwell* v. *Woods*, 3 Watts, 138: In actions on promissory notes, writings connected therewith by direct reference or necessary implication, are admissible by way of showing such note or notes were conditional. In the case of *Davlin* v. *Hill*, 2 Fairfield, (11 Maine), 434, it was held that where the defendant by writing agreed to purchase of the plaintiff for a stipulated price, a certain piece of land, the price to be paid to J. W., and afterwards the plaintiff by an instrument on the back of the agreement, reciting that he had given to the defendant a deed of the land therein described, and acknowledged that he had on the same day received therefor, two notes of hand upon condition that the notes shall be transferred to L. J. as agent for J. W., agreeable to certain agreement, and in an action on one of the notes between the original parties that said agreement might be received in evidence to show that the note was given upon a *condition precedent*, and thus defeat the action, affirming *Hunt* v. *Livermore*, 5 Pic. 395; see also, *Heywood* v. *Perrin*, 10 Pick. 228. But where an agreement or disposition of property can only operate by writing, an instrument referring to another, must discribe it so clearly that by the description it may be identified. For to allow parol evidence to connect two instruments together where there is no reference to

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a foreign instrument, or where the description of it is insufficient, would be to give an effect independant of the writing and contrary to the provisions of law which require the whole to be in writing. *Brodie* v. *St. Paul*, 1 Ves. Jun. 330, *Smart* v. *Prujean*, 6 Ves. 566, *Coles* v. *Frecothick*, 9 Ves. 249, *Boydell* v. *Drummond*, 11 East. 153, *Kenworthy* v. *Schofield*, 2 Barn. & Cress. 948, *Clisson* v. *Cook*, 1 Scho. & Lef. 22, *Towney* v. *Crowther*, 1 Bro. c. c. 161, 318, *Grivins* v. *Calder*, 2 Dess. Eq. R. 188, *Parkhurst* v. *Courtlandt*, 1 John, Chy. R. 273 S. C., on appeal 14 John, R. 15. It would be sufficient if the terms and consideration can be collected from the written correspondence, or papers between parties, though it cannot be collected merely from the defendant's memorandum, provided such memorandum expressly refers to the former correspondence, or to an instrument which contains the whole contract, and state that the terms of the contract are comprised in the writing thus referred to Chitty on Contracts, 7 Am. Ed. 521, *Redhead* v. *Cater*, 1 Stark, R. 14, 19, 4 Camp. 188, *Stead Liddard*, 8 Moore. 2, 1 Bing, 196. It is said in a note to Phili on evidence, vol. 2, page 741, 4 Am. Ed. that "this rule is not to be so interpreted as to exclude evidence for the purpose of offering the terms of the reference; in other words, evidence tending to show what the reference means. The description must be compared with the instruments to which it may possible refer if the description is in some respects erroneous, the erroneous part may be rejected, agreeable to the doctrine *falsa demonstratia*, *&c.*, in short, the reference is to be dealt with as you deal with other descriptions in applying them to the object or subject intended. In *Hodges* v. *Harsfall*, (1 Russ & Mylne, 116) an instrumeut purporting to be an agreement for a lease, contained a clause for the erection of additions according to a plan agreed upon; it appeared that three distinct plans existed for making the additions alluded to, and an objection was made that parol evidence was inadmissible; to determine what plan was meant, Lord Lyndhurst in giving judgment said, "I am of opinion on the authority of all the cases, and especially the case in Scho & Lef, 22 (Supra), where Lord Redesdale has considered the subject very fully that as the written agreement refers specifically to a plan; if there be parol evidence clear and satisfactory to identify the particular plan, that

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evidence may be properly admitted for the purpose of identifying it." See also, *Sanderson* v. *Jackson*, 2 Bossanquit & Puller, 238, and *Dillon* v. *Harris*, 4 Bligh, (N. S.) 343. But if the contract be illegal, the rule would be otherwise. Chitty in his work on contracts, 7 Am. Ed., p. 709, says, "If a contract for the loan of money be void on the ground of the usury, separate security for the principal or interest only, cannot be enforced; it is not material that the usurious contract is to be executed and is evidenced by means of two separate instruments instead of being comprised in one." So if there be two sparate verbal agreements to pay usurious interest, the note is void. *Merrills* v. *Law*, 9 Cow, 65, *Macomber* v. *Dunham*, 8 Wend, 554; see. also, *Hammond* v. *Hoppin*, 13 Wend, 505. In this State the principal, but not the usurious interest could be recovered, and the courts will look to the substance and not the form of the transaction without regard to statements that may be made in the agreement or agreements of the parties. In the case of *Harper et al* v. *Ely et als*, 56 Ill. 179, was an appeal from the equity side of the Circuit Court of Cook county, to reverse a decree dismissing a bill filed by appellants praying to redeem certain premises therein described, from a sale under a mortgage executed by Benjamin F. Bradley, one of the complainants to Benjamin F. Hadduck, and the second point relied on for a reversal of the decree, was that there was no power expressed in the mortgage to sell the property for the whole debt under the exercise of the holders option to declare the whole debt due upon a default in the payment, and none can be implied. The court per BREESE, JUSTICE, say, "It appears from the record, that the bonds were executed by Bradley to Hadduck, one in the penalty of $16,000, to secure the notes of $8,000 principal, and ten other notes of $200, each being interest notes and payable to James McQuestion and William C. Thompson, which notes Hadduck signed as security of Bradley, and to secure the payment therefor Bradley, on the same day, September 28th, 1859, together with his wife, executed a deed of trust to Edward H. Hadduck on the premises in controversy.

Being indebted to Benjamin F. Hadduck in the sum of $13,-000 for money loaned, Bradley, on the same day, made and delivered to Hadduck a bond in the penalty of $20,000, conditioned for

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the payment of the said sum of $13,000 within seven years from the 1st day of December, 1859, with ten per centum per annum interest thereon, to be computed from the 1st day of June, 1860, and payable semi-annually, on the 1st day of June and December of each year, according to thirteen interest notes or coupons attached to the bond, for the sum of $650 each, excepting the one maturing on the 1st day of December, 1866, which was for the sum of $758.33. This bond contained this proviso, "that if default be made in the payment of any of the interest on the said principal sum as aforesaid, and any portion thereof shall remain due and unpaid for the space of thirty days after the same shall become due and payable, according to the above recital and condition; and in that case, the said principal sum, together with all arrearages of interest thereon, shall, at the option of the said Benjamin F. Hadduck, his executors, administrators, or assigns, thereupon become due and payable, and may be demanded immediately, or at any time within thirty days after any such default. To secure the payment of this last mentioned bond, and the coupons thereto attached, and to secure the performance of the covenants contained in the bond for $16,000, the mortgage in question was executed. In the above mentioned bond it is conditioned, if default be made in the payment of any interest on the principal sum, and any portion thereof shall remain due and unpaid for the space of sixty days after the same shall become due and payable, in that case the principal sum, together with all arrearages of interest thereon shall, at the option of Hadduck, his executors, etc., thereupon become due and payable, and may be demanded immediately, or at any time within thirty days after any such default. The default here provided for is in the payment of interest, and the penalty therefor is, that the principal sum, together with arrearages of interest, at the option of Hadduck, shall become due and payable, and may be demanded immediately. Now what is the provision in the mortgage? As plain as language can express an idea, it provides that Hadduck may sell and dispose of the premises, and all benefit and equity of redemption of Bradley, in case default be made in the payment of the said sums of money mentioned in the mortgage, or of the interest that may become due thereon, or if any part thereof, at the time and times respectively

when the same ought to be paid, as set forth in the condition. Nothing is said in the mortgage about declaring an option by Hadduck, but, by the terms of the mortgage, a default in the payment of the interest matured the debt, and authorized the mortgagee to enter upon and sell the premises in satisfaction thereof." In the case of *Ottawa North Plank Road Co.* v. *Murray*, 15 Ill. 336, it was held that where the condition of a bond and mortgage is that on failure to pay an instalment of interest when due, the principal should immediately become due and payable; a neglect to pay an instalment of interest when it becomes due, works a forfeiture of the mortgage, the court say, "By the terms of the mortgage, the principal was to become due on the failure of the company to pay the interest promptly. It failed to pay the first instalment of interest when it fell due, and the mortgage was thereby forfeited. The proof introduced by the company did not sustain the allegation of the answer that the complainant waived the forfeiture by afterwards accepting the interest. He refused to receive the money tendered, and thereby insisted upon the forfeiture." But where by the terms of an agreement a larger sum is to be paid upon default of payment of a smaller one on a given day, the provision for the payment of the greater sum is a penalty, therefore a provision in a mortgage that the whole sum shall become due upon a failure to pay any instalment on the day, is in the nature of a penalty, against which equity will relieve upon adequate compensation, which is the payment of principal and interest, and the costs made in a proceeding to sell under such power, *Tiernan* v. *Hinman*, 16 Ill., 400. This was a bill for injunction to restrain Hinman from selling certain premises under a power of sale. The mortgage provided for the payment of several sums of money running through a series of years, without interest. The mortgage deed contained a proviso, that if the money and each instalment thereof should not be paid when the same and each of them should become due and payable, that then the whole moneys in said mortgage, and every instalment thereof should become immediately due, with power of sale. The premises were advertised for sale. Afterwards and before the day of sale the instalment and interest, and costs due, was tendered, and before the filing of the bill the amount was accepted with a stipulation that the acceptance of the same should not preju-

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dice such rights as the party then had by reason of the nonpayment of the same at maturity. A preliminary injunction was granted by the Circuit Court, and cn the hearing by the Circuit Court the injunction was dissolved, and the bill dismissed; to this ruling of the court the complainant excepted, and assigned for error the dissolving the injunction and dismissal of the bill, and the Supreme Court in delivering the opinion say, "The Circuit Court should have entered a decree, enjoining the sale upon condition that payment be made of the sums thereafter to become due, as they respectively fell due. We regard the proviso in the mortgage that the whole sum shall become due upon failure to pay any one of the instalments *on the day*, a proviso *in terrorum*, and in the nature of a penalty, against which equity will relieve upon adequate compensation. There is no difficulty in this compensation. It is the payment of the instalment due, the interest accrued thereon, and the costs incurred in the proceeding to sell under the power. This is done and Hinman is thereby in contemplation of equity, placed in the same condition he would have been had the instalment been paid on the day it became due. But Hinman seeks to collect the whole mortgage debt by reason of the nonpayment of a small portion thereof on the day. If he is allowed to do so, a considerable sum of money, in the way of interest is forfeited by the mortgagor to him, for there is no substantial difference in the forfeiture of a sum of money in the shape of interest, or of a named sum as a penalty. The instalments extend through a series of years up to 1859, and are without interest.

The proviso, if operative works a forfeiture of the use of the money for the period of the credit provided, for which use or credit is of the substance and essence of the contract has a legal value and is capable of ascertainment by computation. To deprive the mortgagor then of this credit without a rebate of interest, is to take from him without consideration so much money, as the interest on the instalments not due for the periods they respectively run amounts to. This can be nothing else than a penalty which equity will always relieve against whereby the terms of a contract a greater sum of money is to be paid upon default in the payment of a lesser sum at a given time, both courts of law and equity will hold the provision for the payment of the greater sum to be a

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penalty. And even where the parties stipulate for the payment of a sum certain on default of performance of an agreement, such stipulation will be treated as a penalty if the damages are not difficult of ascertainment, *Skinner* v. *Dayton*, 2 John, Chy. R. 526, 7 Vers. Chy. R. 273, 2 Vers. Chan. 316, 6 Binghams R. 141, *Lansing* v. *Capron, et als*, 1 John, Chan. R. 617, 18 John, R. 219, 6 Munford's R. 71, 6 Iredell's R. 65, *Carpenter et al* v. *Lockhart*, 1 Carter's Ind. R. 435, 1 Denio's R. 464, 22 Wend's Reports, 163, 9 Paige Chan. R. 101, *Law* v. *Chapin*, 16 Ill., 475, *Broadwell* v. *Broadwell*, 1 Gil. 600;" see also, *Blair* v. *Chamblin*, 39 Ill., 522. The case of the *Ottawa Plank Road Co.* v. *Murray*, *supra*, is not in conflict with the above cited authorities. In the case of *Scott* v. *Field*, 7 Watts, (Penn.) 360, it was held that an action of debt could not be maintained upon a mortgage which contained no express promise to pay, therefore, upon the mortgage no personal responsibility was created by the mortgage; the court per SARGENT, J. say, "The authorities and the reason of the thing seem to show that a mortgage is not of itself an instrument by which a personal liability for the money is raised, and on which an action of debt or covenant can be maintained by the mortgage against the mortgagor, but that his remedy on such mortgage is confined to the land itself which is put in pledge; yet if there be any prior or accompanying cause of action which of itself creates a personal liability distinct from the mortgage, such as a loan, a bond, or other claim, the mortgage is not to be considered as merging such claim or demand, but is merely a collateral security. Mortgages in this State are usually accompanied with a bond or warranty of attorney as this purports to be; sometimes they are given to secure notes or other instruments, sometimes to secure warrants of indemnity, and sometimes in the naked, simple form of a mere mortgage, given for the purpose perhaps, of securing the debt of a third person. And when they are given in any of these modes, it has never been supposed that an action of debt or covenant for the money would lie upon the mortgage itself, but the remedy of the party upon the mortgage is against the land only."

In England it would seem to be the practice to insert in a mortgage among other covenants, a covenant for the payment of the

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money, and in that case, no doubt, debt or covenant lies. A like covenant inserted in our mortgages would answer the same purpose, but it is not used ; the more common mode being to make use of a bond or separate instrument to show the nature of the debt. It has been repeatedly held that the covenant must be an express one, and that no action will lie on the proviso or condition in the mortgage, 1 P. Wms. 268, Yelv. 206, 3 Atk. 278, *Drummond* v. *Richards*, 2 Munford, Va., 337. It was contended in the case of *Scott* v. *Field*, *supra*, that as there was an acknowledgment of a debt in the mortgage, that debt could be maintained, but the court say, "If there were such an acknowledgement of a prior debt and no more, as for instance if it recited money borrowed, it would rather seem from the authorities, that the action *in personam* should be on the contract by which the debt arose, and that no implied contract inferred from the mortgage will be sufficient. But here the acknowledgement is of a bond for the payment of a sum of money by instalments, and the mortgage is declared to be expressly given to secure the payment of the bond according to the condition, the remedy then against the party must be upon the bond." No contract of borrowing or loan, can be implied in law from the mortgage as the foundation of the action when the contract between the parties is express and formal *expressum facit cessare tacitum*. It would seem from the above cited authorities that for the purpose of foreclosing a mortgage in equity, that the mortgage may so provide that the notes shall become due on default of payment of any instalment of the principal or interest if the notes are bearing interest. *Ottawa Plank Road Co.* v. *Murray*, *supra*, but if the notes do not bear interest, that the same would be regarded in equity as a penalty, and by tendering the amount actually due with costs would prevent a decree. *Piernan* v. *Hinman*, *supra*. But on the other hand, an action at law cannot be maintained upon the rules until the same matures, unless the agreement that in default of payment of an installment of the principal or interest should work, a forfeiture should be imbodied in the note or bond secured by the mortgage. It would seem that equity will relieve against forfeitures in almost every case where the party will be damnified by the compulsory payment of money before the maturity of the same in fact.

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Supreme Court of Pennsylvania.

JONES v. TRACY.

ERROR TO THE COURT OF COMMON PLEAS OF BRADFORD COUNTY.

A defendant can claim his exemption out of his effects in the hands of a garnishee, and the garnishee is liable for the amount if he suffers judgment to go against him.

Opinion of the court delivered May 11, 1874, by

AGNEW, C. J.—The Act of April, 1859, supplementary to the exemption law of 1849, 1 Bright., 638, gives to a defendant a "right to elect, to retain his exemption or any part thereof out of any bank notes, money, stock, judgment or other indebtedness to such person. It is admitted that Thomas S. Jones, the defendant below, duly claimed his exemption out of the effects in the hands of Abn. Solomon, the garnishee. Here, then, there was a clear legal right claimed in time, and yet the court below gave judgment against Jones' exemption, on the ground that there was a judgment by default against the garnishee, which either he or Jones ought to have prevented. But how could Jones be affected by Solomon's neglect to appear? His right was to have his $300 exemption against the plaintiff. Presumptively, as the case stood, Solomon owed a debt to Jones, and it should be a matter of indifference to him whether the money would go to Jones or to the plaintiff. If the neglect of Solomon to appear can be made to displace the exemption, it would enable the plaintiff and garnishee always by collusion to avoid the exemption, and discharge the garnishee to the extent of the plaintiff's debt. The garnishee can plead to the attachment only that which tends to discharge himself from the debt he owes to the defendant in the attachment, or to protect himself against a double recovery. He cannot plead or set up the exemption; this is a personal privilege of the defendant, who must avail himself of it, and here the defendant has done so. It was not the business of the defendant to prevent judgment by default against the garnishee. The real difficulty here is that the judgment by default was erroneously entered. It ought to have followed the facts of the case and to have been so framed, or to protect the defendant's examination. It was simply a judgment for the amount of the plaintiff's claim. But every regular judg-

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ment in attachment concludes with a discharge of the garnishee to the extent he has to pay under the attachment. Sergeant on attachment, 40; 6 Wharton, 181. If, therefore, the garnishee's debt to the defendant is less than the exemption of $300, an unqualified judgment of discharge, would cause the defendant to lose so much of his exemption. But it is very evident that the neglect of the garnishee to appear was his own fault, and not that of the defendant, and therefore the garnishee alone should suffer for his omissions. Our act relating to attachment has made no provisions as the effect of a judgment by default for want of appearance, having provided for this effect of judgment in case only of a default to answer interrogatories, and upon trial and verdict. But in *Layman* v. *Beam*, 6 Wharton, 181, opinion by SERGEANT, J., it is held that the legal effect of a judgment by default for nonappearance, is that the garnishee has assets of the defendant in his hands sufficient to answer the plaintiff's debts and costs. The garnishee was bound to know that the defendant had a right to elect to retain his exemption out of the debt, and therefore that his default might leave him liable to the plaintiff beyond the sum allowed to be retained. The effect of the default was an admission by the garnishee that he owed the defendant a sum sufficient to discharge the plaintiff's debt, over and above the exemption of $300. The proper judgment, therefore, would have been that the plaintiff, G. P. Tracy, have judgment by default against Abn. Solomon as garnishee for want of non-appearance, and that the plaintiff have execution of so much of the debt due by said Abn. Solomon to the said Thomas S. Jones, as will satisfy the judgment of the said G. P. Tracy, against the said Thomas S. Jones, with interest and costs, and if the said Abn. Solomon refuse or neglect, on demand by the sheriff, to pay the same, then to be levied of the proper goods, chattels and lands of the said Abn. Solomon, according to law, as if the same were his proper debt, and that the said Abn. Solomon thereupon be discharged as against the said Thomas S. Jones, for the sum so attached and levied of the debt and moneys in his hands to the extent and so far only, as the same sum so attached and levied may exceed the sum of $300, without prejudice to the right of said Thomas S. Jones to recover from the said Abn. Solomon the said sum of $300, or any less sum due and owing by

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the said Abn. Solomon to him at the time of, or at any time since, the service of the attachment.

We, ourselves, might so enter the judgment, but as the default of the garnishee may have arisen from misconception of his duty, which the court below might rectify, if injustice would be done by opening the judgment on terms, we shall reverse the judgment below and order a *procedendo*.

Judgment reversed and a *procedendo* awarded.

The question presented in the foregoing case is new in our practice, and its application to our present statute of exemptions and garnishments makes it of great importance to the profession in this State. Our statute laws of 1872, entitled Homestead, p. 480, § 13, provides that "The following articles of personal property owned by the debtor, shall be exempt from execution, writ of attachment, and distress for rent, viz: 1. The necessary wearing apparel of every person. 2. One sewing machine. 3. The furniture, tools and implements of any person necessary to carry on his trade or business, not exceeding one hundred dollars in value. 4. The implements or library of any professional man, not exceeding one hundred dollars in value. 5. Materials and stock designed and procured by him, and necessary for carrying on his trade or business, and intended to be used or wrought therein, not exceeding one hundred dollars. And also when the debtor is the head of the family, and resides with the same, the following property:

1. Necessary beds, bedsteads and bedding, two stoves and pipe.

2. Necessary household furniture, not exceeding in value two hundred dollars.

3. One cow, two swine, two sheep for each member of the family, and the fleeces taken from the same, and the yarn and cloth that may be manufactured from the same.

4. One yoke of oxen or two horses in lieu thereof, worth not exceeding two hundred and fifty dollars, with the harness therefore.

5. Necessary provisions and fuel for the use of the family for three months, and necessary food for the stock hereinbefore exempted for the same time.

6. The bibles, school books, and family pictures.

7. The family library.

8. Cemetery lots or rights of burial, and tombs for repositories for the dead.

9. One hundred dollars worth of other property suited to his condition in life selected by the debtor." § 14 provides that "whenever the debtor has not any or all of the specific articles hereinbefore exempted, he may elect others of equal value in their stead, or he may retain the value thereof in money, if he shall so elect," Our statute entitled Garnishments, laws of 1872, p. 465, provided, § 11, "If it appears that any goods, chattels, choses in action, credits, or effects in the hands of a garnishee, are claimed by any other person by force of any assignment from the defendant or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served upon him in such manner as the court or justice shall direct." By this section, any person, other than the defendant, is allowed

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to come into court and set up and prove his claim. But there is no provision directly authorizing the defendant to come into court and set up that he claims the property as exempt, and section 20 of the act provides that "when any garnishee has any goods, chattels, choses in action or effects, other than money, belonging to the defendant, or which he is bound to deliver to him, he shall deliver the same or so much thereof as may be necessary to the officer who shall hold the execution in favor of the plaintiff in the attachment, suit or judgment, which shall be sold by the officer, and the proceeds applied and accounted for in the same manner as other goods and chattels taken on execution."

By section fourteen of the act it is provided that, "The wages and services of a defendant, being the head of a family, and residing with the same, to an amount not exceeding twenty-five dollars, shall be exempt from garnishment. In case the wages or services of such defendant in the hands of a garnishee shall exceed twenty-five dollars, judgment shall be given only for the balance above that amount." If it be true as held in the principal case, that a defendant in execution can claim his exemption out of his effects in the hands of a garnishee, and that the garnishee is liable for the amount if he suffers judgment to go against him, it becomes very important for both the garnishee and defendant in the execution should understand their duty and their rights. The garnishee can plead to the attachment that which tends to discharge himself from the debt he owes to the defendant, or discharge his obligation to deliver the property to the defendant, or to protect himself against a double recovery; section thirteen of the act provides that, "Every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands, all demands against the plaintiff, and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee whether the same are at the time due or not, and whether by the way of set-off on a trial, or by the set-off of judgments, or executions between himself and the plaintiff, and defendant severally, and he shall be liable for the balance only after all mutual demands between himself and the plaintiff, and the defendent are adjusted, not including unliquidated damages for wrongs and injuries, *provided* that the verdict or finding, as well as the record of the judgment, shall show in all cases against which party and the amount thereof, any set-off shall be allowed, if any such shall be allowed."

Both statutes above cited were passed at the same session of the legislature, and are to be construed together. And when so construed, if money or property if in the possession of the defendant in the attachment or execution would be exempt from execution, it would remain exempt in the hands of the garnishee.

The 14th section of the act entitled Garnishment, above cited, must be held as absolutely exempting twenty-five dollars of the wages or services of the defendant in execution from liability to garnishment, and that the residue if it be claimed by the defendant as exempt under the chapter entitled Homestead exemption, above cited, then he must proceed under that statute, and set up his claim. The garnishee cannot set up the exemption, this is a personal privilege of the defendant who must avail himself of it in apt time. The garnishee is bound to know that the defendant has a right to elect to retain his exemption, if entitled to any, under section 14 of the Homestead act, above cited, out of the money in his hands, or to elect to take any property in his hands under section thirteen of the act.

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It was held in the case of *McCluskey* v. *McNeely*, 3 Gil., 578, that a debtor in an execution should select the property exempt from execution before a levy is made, if notified in time by the officer to make such selection, but if the officer neglect to give the notice before a levy is made the debtor may make the selection and notify the officer thereof at any reasonable time before the sale takes place, and that the notice may be either in writing or by parol. And in the case of *The People, for use, &c.* v. *Palmer, et al*, 46 Ill., 398, it was held that, it is the duty of the officer having an execution in his hands before he proceeds to take or seize any of the personal property of the defendant in the execution by a levy thereon, to notify such defendant if practicable of his having the execution in his hands, and on so doing the right arises to the defendant to select such property as he desires to retain under the statute, surrendering to the officer all his other property not thus selected or specifically exempt, for the satisfaction of the execution, and if the defendant so neglects or refuses to make a selection of property the officer may proceed to levy upon any of his property not specifically exempt, and sell it regardless of any claim the defendant may subsequently set up to such property as having been selected by him. But in case of the absence of the defendant from the county while the sheriff had the execution, and could not therefore be notified, it was the duty of the sheriff to make a levy on all property not specially exempt, and thereafter the defendant may make his selection of the property so levied on, of the same quality and value as before the levy. But in such case the defendant should surrender or offer to surrender an amount of other property, sufficient to satisfy the execution, and failing to do this, the officer may proceed with the sale, unless the aggregate value of the property selected did not exceed the value of the property exempted under the statute. It would seem from the principal case and the cases above cited that it is the duty of the defendant in attachment to select the property or money in the hands of garnishee at the earliest moment after he has notice of the proceedings, and that unless the garnishee gives notice to the defendant in execution, and allows judgment to go without such notice, he might be made liable to a double recovery. And it would seem to be the duty of the plaintiff in the attachment or execution to give notice to the defendant of the proceedings, in order to fully protect himself and the officers. Suppose a judgment of one hundred dollars is obtained against a party the head of a family, and residing with the same in this State, and the owner of one horse, of the value of one hundred dollars, and such judgment debtor should loan the horse to his neighbor, and such neighbor should be garnisheed he should notify the defendant in execution, who should at once set up his exemption, and failing to do so he would, as held in the cases above cited, waive his right so to do. Whether or not a judgment debtor can claim as exempt, a running account against a garnishee, may well be doubted. If personal property or money exempt should be garnisheed, an action of replevin or trover might be maintained, or it may be that the courts will hold that he can become a party to the garnishee proceedings, and set up his rights in that way. It would seem to be a just construction of the statute, entitled garnishment, to hold that whatever property, money or credits would be exempt under the exemption laws, if in the possession and control of the judgment debtor, should remain exempt in the hands of his trustee; but the exact view that will be taken by the courts upon the many interesting questions growing out of the two statutes cannot now be determined with any degree of accuracy, hence this note is to be regarded as suggestions to the profession.

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Supreme Court of Illinois.

RAMSEY v. HOEGER, Error to Clinton County.

1. The question is presented by this record, whether under the constitution and laws in force when the tax sought to be enjoined was levied, a higher rate of taxation can be imposed for State purposes, on taxable property in counties which have no outstanding indebtedness, incurred in aid of the construction of railroads, than is imposed on taxable property in counties which have such indebtedness.

2. The 1st, 4th, 5th, and 9th sections of the act entitled, an act to fund and provide for paying the railroad debts of counties, townships, cities and towns, in force April 16th, 1869, considered and construed.

3. This statute does not constitute a contract between the State and the creditors of the corporations intended to be aided, because the legislature was prohibited from making such a contract by section thirty-eight, of article III, of the Constitution of 1848.

4. The effect of the act was to exempt tax-payers in the townships, counties, cities and towns availing of its provisions, from the payment of so much of the State tax as is appropriated to the particular counties, townships, cities and towns.

5. The rule is that exemptions from taxation are always subject to be recalled when they have been granted as a mere privilege, and not for a sufficient consideration.

6. There is no authority in the law or under the constitution for a county clerk to extend a tax, otherwise than equally upon all taxable property, in proportion to its value, as ascertained and determined by those upon whom the law has imposed the duty of assuring it.

7. Under the constitution and law now in force, so much of the act of 1869, as requires the State revenue to be collected on the valuation of the taxable property in the State remaining after deducting in counties, townships, cities and towns which have outstanding indebtedness incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated and cannot be enforced.

Opinion of the court by

SCHOLFIELD, J.—The question is presented by this record whether, under the Constitution and laws in force when the tax sought to be enjoined was levied, a higher rate of taxation can be imposed for State purposes, on taxable property in counties which have no outstanding indebtedness incurred in aid of the construction of railroads, than is imposed on taxable property in counties which have such indebtedness.

That the tax levied by the act in force July 1st, 1873, has been so apportioned, is admitted by both parties; and it is claimed by the appellee to be justified by the provisions of an act in

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force April 16, 1869, entitled, "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns." The only sections of this act bearing on the question are the first, fourth, fifth and ninth, which are as follows:

"SECTION 1. Whenever any county, township, incorporated city or town, shall have created a debt which shall remain unpaid, or shall create a debt under the provisions of any law of this State to aid in the construction of any railway or railways that shall be completed, within ten years after the passage of this act, whose line shall run near to, or into, or through said county, township, city or town, it shall be lawful for the State Treasurer, and he is hereby required, immediately upon receiving the revenue of each year, to place to the credit of such county, township, city or town, so having incurred such indebtedness, in the State treasury annually, for and during the term of ten years, all the State taxes collected and paid into the State treasury on the increased valuation of the taxable property of said county, township, city or town, as shown by the annual assessment rolls, over and above the amount of the assessment roll of 1868, except the state school tax and the two mill tax provided for by the Constitution of this State for the payment of the State debt. And whenever any county, township, city or town, shall have created a debt as aforesaid, it shall also be lawful for the Collector of the taxes, and he is hereby required, annually, for and during the term of ten years, to pay into the State treasury all the taxes collected for any purpose whatever, on the assessment of railroad or railroads for whose aid the said debt was incurred, including the road bed, and superstructure, and all fixtures and appurtenances thereof, the locomotives, cars, machinery and machine shops, depots, and all other property, real and personal, of said railway companies within said county, township, city or town; and immediately upon receiving the same, the State Treasurer shall place to the credit of such county, township, city or town, in the State Treasurer, the whole amount so received, except the State school tax and the two-mill tax provided by the Constitution of this State for the payment of the State debt; and it shall be the duty of said Collector of Taxes, to furnish the State Auditor a separate and detailed account of the amount of taxes collected from said railway or railways, at the time of his Annual settlement with the State Auditor. And the State Treasurer shall give to the Collector separate receipts for the respective amounts paid into the State Treasury to the credit of said county, and said receipts shall be taken and received by the County Court, or other legal authorities, as vouchers for the amount collected on account of the county and local assessments on said railroad property in the annual settlement with such Collector, and the several amounts of money in this section provided and orded to be placed to the credit of such county, township, city or town, and shall be applied by the State Treasurer to the payment of the bonded railroad debt of such county, township, city or town, as hereinafter provided.

SEC. 4. When the bonds of any county, township, city or town, shall be so registered, the State Auditor shall annually ascertain the amount of interest for the current year due and accrued, and to accrue upon such bonds, and from the amount so ascertained he shall deduct the amount in the State Treasury placed to the credit of such county, township, city or town, as herein provided and directed, and from the basis of the certificate of valuation of property, heretofore provided to be transmitted to him; or in case no such certificate shall be filed in this office, then upon the basis of the total assessment of such county, township, city or town, for the year next preceding he shall estimate and determine the rate per centum on the valuation of the property within such county, township, city or town, requisite to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the State of collection and disbursement of the same, to be estimated by the Auditor and Treasurer, and shall make and transmit to the County Clerk of such county, or to the officer or authority whose duty it is or shall be to prepare the estimates and books for the collection of State taxes in such county, township, city or town, a certificate stating such estimated requisite per centum, for such purpose to be filed in his office; and the same per centum shall thereupon be deemed added to and a part of the per centum which is or may be levied or provided by law for purposes of State revenue, and shall be so treated by such clerk, officer or authority, in making such estimates and books for the collection of taxes; and the said tax shall be collected with the State revenue, and all laws relating to the State revenue shall apply thereto, except as herein otherwise provided.

SEC. 5. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, township, city or town, and shall not be deemed in any manner liable on account of any such bonds, but the tax and funds so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for until fully satisfied. The State shall annually collect and apply all the said taxes and funds placed to the credit of such county, township, city or town, for and during the term of eight years, to the payment of the annual interest on such registered bonds of such county, township, city or town, in the same manner as interest on the bonds of the State is or may be collected and paid, but in like moneys as shall be receivable in payment of State taxes; and for and during the remainder of the term of years which said registered bonds shall remain unpaid, the funds provided in Sec. 1 of this act, accruing from taxes collected from the property of said railroad or railroads, and the surplus, if any, of the other funds in this act provided, remaining after the payment of the interest on the bonds, shall be applied to the payment of the principal of said registered bonds on presentation at the State Treasury, or the Treasurer shall purchase the same in open market at not more than par; and upon such payment or purchase of the said bonds, the amount paid

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upon the principal of said bonds shall be indorsed thereon and the receipts therefor, shall be taken and filed in the office of the State Treasurer, and the interest, coupons or bond when fully paid shall be returned to the office of the State Treasurer, and shall be canceled and destroyed in the same manner as those appertaining to the State debt; and the fund derived from the taxes collected on the increased assessment over the year 1868, and the tax levied to meet the interest on said registered bonds, shall continue to be annually applied to the interest of said bonds; and the said taxes and funds required in this act, to be placed to the credit of counties, townships, cities and towns, shall be applied by the State Treasurer to the payment of the registered railroad bonds of such county, township, cities or towns equally and without discrimination.

SEC. 9. And the State Auditor, from the total value of all the property in the State, after the same shall have been equalized in accordance with the provisions of "an act to amend the revenue laws, and to establish a State Board of Equalization of Assessments," approved March 8, 1867, shall deduct the amount of said increased valuation of the taxable property above the valuation of the year 1868, in such counties, townships, incorporated cities and towns as may be entitled to the benefits of this act, and the taxes upon which are herein directed to be credited to counties, townships, cities and towns, and upon the amount remaining he shall cause to be collected such a per cent. as shall be sufficient to pay the appropriations and other demands upon the treasury due to the end of each fiscal year; and the same per cent. shall also be collected on the said increased valuation above the valuation of 1869, and applied as herein provided."

It cannot be held, as insisted by the counsel for appellee, that this statute constitutes a contract between the State and the creditors of the counties, townships, cities and towns intended to be aided, for the plain reason that the legislature was prohibited from making such a contract by section 38 of article III of the constitution of 1848, which declares, "The credit of the State shall not in any manner be given to or in aid of any individual, association or corporation." It is impossible to say that such creditors can have a claim upon the State, unless its credit was, in some manner, given to or in aid of them; nor can we conceive how there can be a vested right in that which cannot be granted.

The necessary effect of the act was to exempt tax-payers in the counties, townships, cities and towns, availing of its provisions, from the payment of so much of the State tax as is appropriated to the particular counties, townships, cities and towns. The debts in aid of which the appropriation is made are local only. *Dunnovan et al* v. *Greene*, 57 Ill., 63. They are created by municipal authority, for what is, at least theoretically, municipal purposes, and, therefore, for a sufficient consideration received by the municipality. It is upon this hypothesis alone that such corporations have been held to possess power to subscribe for shares of capital stock in railroad companies, and incur indebtedness to pay the subscription. *Prettyman* v. *Supervisors of Tazewell Connty*, 19 Ill., 406; *Roberts* v. *City of Rockford*, 21 Id., 457; *Johnson* v. *County of Stark*, 24 Id., 85.

It cannot be denied that at the date of this enactment the State possessed power to require that full and equal taxation should

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be levied for State purposes upon all the taxable property in the State, without regard to the indebtedness of particular counties, townships, cities and towns favored by the act; and since the taxpayer is, aside from the act, liable to be taxed for the payment of the debts of the county, township, city or town in which his property is subject to taxation, it cannot be said that the State has received any consideration for the exemption granted by the act. We cannot then, otherwise regard the exemption from State taxation, as contemplated by the act, than as a mere gratuity, the continuance of which rested in the pleasure of the legislature, and the sovereign power of the State.

No doubt many persons have been, through a misapprehension of its proper construction and effect, induced to vote to incur indebtedness by particular counties, townships, cities and towns, to a greater extent than they otherwise would; but we can perceive no difference between their condition and that of the individual who, relying on the continuance of the bounty of a friend or relative, contracts debts which the subsequent withdrawal of that bounty leaves him to pay from his own limited resources.

The rule is that exemptions from taxation are always subject to be recalled when they have been granted as a mere privilege, and not for a sufficient consideration. (Cooley's Constitutional Limitation, 383.)

It is manifest, therefore, that a system of taxation, enforced either by a new constitution, or by an act of the General Assembly, inconsistent with the provisions of the act, would necessarily, to that extent, render it inoperative, although there might be no professed design to repeal it. (*Hills* v. *Chicago*, 60 Ill., 86.)

It is argued that it was not intended by those who framed the present constitution to repeal any of the provisions of the act of 1869, that it was only intended to ordain a revenue system which should apply to the future. This may be so, yet if the language of that instrument is clear and free from ambiguity, no doubt it must control, whatever may have been the design of those by whom it was framed. (Cooley's Constitutional Limitations, 69.)

If it shall be conceded that the revenue system which it contains was not self-executing, but that it required legislation to put

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it in force, still it cannot be denied that when the General Assembly did, subsequent to its adoption, enact a revenue system, such system was required to conform to its provisions. It surely cannot be claimed that, under the guise of enacting laws to give effect to the provisions of a constitution, principles can be perpetuated in diametrical opposition to those provisions. (*Hills* v. *Chicago*, *supra*).

The present constitution contains the following:

SEC. 6. article 9. "The General Assembly shall have no power to release or discharge any county, city, township, town or district, whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of the taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever."

And SEC. 1, of the same article requires the General Assembly "to provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

The language of these sections is so clear and unambiguous that there can be no necessity of resorting to the debates of the Constitutional Convention to ascertain their plain, obvious and natural meaning.

The tax involved in the present suit is levied by virtue of an act in force July 1st, 1873, which is as follows:

"There shall be raised by levying a tax, by valuation, upon the taxable property in this State, the following sums for the purposes hereinafter set forth:

"For general state purposes, to be designated "Revenue Fund" two million five hundred thousand dollars, upon the assessed value of property for the year 1873, and one million five hundred thousand dollars annually thereafter; for State school purposes, to be designated "State School Fund." (in lieu of the two-mill tax therefore) one million dollars annually.

SEC. 2. The Governor and Auditor shall, annually, compute the separate rates per cent. required to produce not less than the above amounts, anything in any other act providing a different manner of ascertaining the amount of revenue required to be levied for State purposes to the contrary notwithstanding; and when so ascertained, the Auditor shall certify to the County Clerks the proper separate rates per cent. therefor, and also such definite rates for other purposes as are now or may hereafter be provided by law to be levied and collected as State taxes.

This tax is levied on all taxable property in the State; and it is not admissible, either under the language of the act or of the Constitution, that of the proportional amount of each tax-payer, as determined with reference to such valuation, in some counties, townships, cities or towns, he shall only be required to pay one-half, or one-third, while in other counties, townships, cities and towns he shall be required to pay that much more.

The duties of the Governor and Auditor in respect to this levy were purely ministerial. They had no authority to do more than compute the separate rates per cent. required to produce the amount of the levy; and when this was done, and the result certified by the Auditor to the County Clerks, there was no authority in the law, or under the Constitution, to extend it otherwise than equally, upon all taxable property, in proportion to its value, as

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ascertained and determined by those upon whom the law imposed the duty of assessing it.

The section 4 of the act of 1869, it will have been observed, requires the Auditor and Treasurer, after ascertaining the deficiency in the amount necessary to pay the interest upon the indebtedness of any county, township, city or town, incurred in aid of the construction of railroads, for the current year, after deducting the sum which may have been received for that purpose under section 1, to estimate and determine the rate per centum on the valuation of property within such county, township, city or town, required to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the State of collection and disbursement of the same, to be estimated by the Auditor and Treasurer, and shall make and transmit to the County Clerk of such county, * * * a certificate stating such estimated requisite per centum for such purpose, to be filed in his office; and the same per centum shall thereon be deemed added to, and a part of the per centum which is or may be levied or provided by law for purposes of State revenue, and shall be so treated by such clerk, &c.

This clearly authorized the levy and collection of the amount necessary to supply the deficiency in the payment of the interest due upon the indebtedness of such counties, townships, cities and towns, incurred in aid of the construction of railroads, as State revenue, but it is expressly limited to the county, township, city or town, by which the particular indebtedness is incurred. And, so far as the last clause of section 2 of the act in force July 1st, 1874, can have any reference to the act of 1869, it must relate to this section. It certainly confers no authority to extend a tax, levied for the purpose of paying municipal indebtedness incurred by one county, township, city or town, upon the taxable property of a different county, township, city or town; nor does it authorize the $3,500,000 to be appropriated otherwise than equally upon the assessed value of all the taxable property in the State.

No words that we can conceive can add force or precision to the language of the constitution before quoted: "The General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants there-

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of, or property therein, from their or its proportionate share of taxes to be levied for State purposes."

Even the General Assembly which levied the present tax derived its existence from the provisions of the same constitution, and if this provision was not binding upon it, it is impossible to conceive that it ever can leave any obligatory force. It is impossible for us to escape the conclusion, that under the constitution and law now in force, so much of the act of 1869, as requires the State revenue to be collected on the valuation of the taxable property in the State, remaining after deducting in counties, townships, cities and towns which have outstanding indebtedness incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated and cannot be enforced.

The same question substantially, as that presented by the present case was before this court in *People, ex rel* v. *Kaskaskia Navigation Company*, at the June term, 1872, and the views here expressed are in harmony with what was then said.

We forbear the expression of any opinion as to whether so much of the $3,500,000 actually and legally levied for State purposes, as shall be collected from the increased valuation over that of 1868, which is claimed to be appropriated to the particular counties, townships, cities and towns, can be maintained as a standing appropriation, as that question is not now before us.

The decree of the court below is reversed and the cause remanded, with directions to that court to ascertain the rate per cent. required to produce the sum levied by the act in force July 1, 1873, for State purposes, and to enjoin the collection of all State taxes levied on the property of appellee, in excess of that rate.

Reversed and remanded—SCOTT, J., dissenting.

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Supreme Court of Illinois.

DANIEL FREESE v. MARY ANN TRIPP.

APPEAL FROM THE COURT OF COMMON PLEAS OF AURORA.

FILED JUNE 20, 1874.

1. The civil remedy given by the act of 1872, entitled, "An act to provide against the evils resulting from the sale of intoxicating liquors, maintained and the statute held highly penal in providing an action unknown to the common law, and should receive a strict construction.

2. The statute contemplates injury in person or property, or means of support, and not the anguish or pain of mind and feelings the plaintiff suffered by reason of the intoxication of her husband.

3. The party suing under the provisions of this statute must prove to the satisfaction of the jury actual damages sustained, and without such proof exemplary damages cannot be awarded against the defendant.

4. The legislature having adopted substantially the statute of the State of Ohio, it is presumed it adopted the construction previously given by the courts of that State.

5. Exemplary damages cannot be awarded as *punishment* in this action by force of the statute, for the reason the statute provides the public shall avail itself of its punitive provisions, which are fines and imprisonment in the county jail.

6. Actual damages to the plaintiff is the central idea of the statute, and if actual damages cannot be established the case falls.

7. It is proper for the defendant to prove that he did not sell the liquor himself, and that he had forbidden his bar-keeper to sell liquor to the party in mitigation, not of actual but exemplary damages.

8. SCOTT, SHELDON, and CRAIG, J. J., dissent.

The opinion of the court was delivered by

BREESE, C. J.—This is an action brought before a justice of the peace in the city of Aurora, in the county of Kane, by Mary Ann Tripp against Daniel Freese, under the fifth section of the act of the 13th January, 1872, entitled an act to provide against the evils resulting from the sale of intoxicating liquors in this state, in force July 1st, 1872.

Section 2, of this act declares it shall be unlawful for any person or persons, by agent or otherwise, to sell intoxicating liquors to minors, or to persons intoxicated, or who are in the habit of getting intoxicated.

Section 5 provides that every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any per-

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son, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part, of such person or persons, * * * * * and a married woman shall have the same right to bring suits and to control the same and the amonnt recovered as a *feme sole*, * * * and all suits for damages under this act may be by any appropriate action, in any of the courts of this state, having competent jurisdiction.

Section 9 provides in the last clause—and justices of peace shall also have jurisdiction of all actions arising under the fourth and fifth sections of this act when the amount in controversy does not exceed two hundred dollars. Such actions to be prosecuted in the name of the party injured or entitled to the debt or damages provided for in said fourth and fifth sections. Sess. Laws 1872, pp., 553-4-5.

The plaintiff sued as the wife of William Tripp, demanding one hundred dollars of defendant for selling her husband, who was in the habit of getting intoxicated, intoxicating liquors. Plaintiff recovered a judgment of one hundred dollars. Defendant appealed to the court of common pleas of the city of Aurora, where the cause was tried by a jury, who returned the following verdict: We, the jury, find Daniel Freese guilty and assess damages of one hundred dollars, as exemplary damages.

This verdict the court refuses to receive, but instructed the jury not to specify in their verdict the damages as actual or exemplary. The jury then retired, and returned in a few moments with a verdict for plaintiff of one hundred dollars. A motion for a new trial was over ruled, and judgment rendered against the defendant for one hundred dollars, to reverse which the defendant appeals.

The case shows that defendant was engaged in selling intoxicating liquors under a license from the city authorities of Aurora, and that Tripp was a shiftless person in the habit of getting intoxicated, and has been for years. Defendant offered to prove that plaintiff herself was a drunkard, and has been confined in the calaboose for being found drunk on the streets.

It appears her husband was in the saloon with one Benedict, and the plaintiff near the door when the liquors were produced on the counter, and could have prevented the act had she been disposed.

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The whole thing seems very much like a cencerted plan to entrap the defendant and was successful. Many like cases will probably occur in enforcing this act.

There is nothing easier than for a husband and wife of low morals, as these parties were, to combine and make a case, calculating on the prejudices of juries for success.

The statute under which this proceeding originated, is of a highly penal character, providing a right of action unknown to the common law in which the party prosecuting has a decided advantage and should, according to the well understood canons receive a strict construction.

Appellant makes his points chiefly on the instructions, and claims that the first instruction for plaintiff was erroneous.

It was as follows :

If the jury believe from the evidence that William Tripp was before and at the time of the alleged selling, or giving of intoxicating liquors to him, by the defendant or his bar-keeper, an habitual drunkard, and that the plaintiff in means of support or *his* person was injured by said William Tripp her husband, while he was intoxicated, or in consequence of his intoxication, caused in whole or in part by the defendant or his agent or bar-keeper, selling or giving to him said William Tripp intoxicating liquors since July 1st, 1872, and before the commencement of this suit, then the jury should find for the plaintiff actual damages to the extent of the injury, and also exemplary damages, and in determining the injury in person, or to the plaintiff the jury have the right to consider the anguish or pain of mind, feelings the plaintiff suffered, if any, by reason of such intoxication of her husband, if any is shown by the proof as well as loss of support if shown by the proof, and exemplary damages are imposed upon the defendant with a view of punishing him for disregarding the law in selling or giving away to the plaintiff's husband intoxicating liquor, in violation of the law if such has been shown, and in fixing the amount of exemplary damages, the jury should consider whether or not the act was wilful or wanton, or not; if it was not, the jury should give her exemplary damages; if it was willful or wanton, the jury should annex more damages.

This instruction is erroneous for several reasons. In the first

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place it is not clear and intelligible, and is difficult of comprehension. In the first place the "anguish or pain of mind, feelings the plaintiff suffered by reason of such intoxication of her husband," is not a matter for the consideration of the jury; the statute contemplates injury in person or property, or means of support, and not mental anguish. The Supreme Court of Ohio, from which state our statute is derived substantially, hold it is not proper in such a case to charge the wife has suffered mental anguish, disgrace and loss of society or companionship—as that does not amount to injury to the person within the meaning of the statute. *Mulford* v. *Clewell*, 21., Ohio St. Rep. 191.

In the *third* place it directs the jury to give not only actual damages, but also exemplary damages, whether actual damages is shown or not. And fourth, it directs the jury to inquire whether the act was wilful or wanton, or not, and if it was *not*, the jury should give her exemplary damages; if it was wilful or wanton the jury "should annex more damages."

We think this is asking too much of the jury. They are told in effect, if no actual damage has been occasioned, they may find exemplary damages if the act of selling was not wilful—if it was wilful they may annex more damages, even if they think no actual damage has been done.

We hold a fair construction of this statute requires a party suing under its provisions should prove to the satisfaction of the jury actual damages sustained, without this exemplary damages cannot be awarded. This is the construction placed upon the act by the highest court of the state of Ohio, and it is reasonable to suppose the legislature adopted the law with the construction put upon it as generally held. *Schnerder* v. *Hosiers*, Ib., 98.

And exemplary damages cannot be awarded as punishment in this action, for the reason, the statute provides the public shall avail itself of its punitive provisions, which are fines and imprisonments in the county jail, the penalty of imprisonment to be enforced by indictment. § § 6. 8. Putting money in the plaintiff's pocket would be no satisfaction to the public for a violated penal statute.

Second of plaintiff's instructions contain the *infirmity* that exemplary damages may be given without proof of actual damage.

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Actual damage to the wife is the central idea in the statute. If that is not established the case falls.

It is urged this error was cured by plaintiffs ninth instruction which was, that the jury could not assess any exemplary damages unless they first find plaintiff has sustained actual damages under the proof and instructions of the court.

Now as the instructions before given were not in entire harmony with this, the jury would be very much puzzled to know what to do. They did on retiring find and return into court a verdict for exemplary damages only. Though the court declined to receive this verdict and sent the jury out to find a verdict for damages without specifying that they were exemplary, they returned a verdict the same in amount, which we have a right to infer was for exemplary damages, as no new and additional evidence had been received. The jury have found no damages but exemplary damages.

The defendant complains that the 12th instruction asked by him was refused. It was as follows:

If the jury believe from the evidence that the defendant did not sell or give away liquors to William Tripp, himself, and that he prohibited and forbid his bar-keeper selling or giving away any liquor to said Tripp, then such fact should be taken into consideration, as to whether or not the plaintiff is entitled to exemplary damage, if the jury should find the defendant guilty.

The court having instructed the jury on behalf of plaintiff, that they could give exemplary damages, it was but fair defendant should have the right to show matters in mitigation. If defendant in good faith had forbidden his clerk or bar-tender to sell or give liquors to this drunkard, and the clerk wilfully disobeyed him, without defendant's connivance, it seems to us it would be a fair subject for consideration in mitigation, not of the actual damage which may have been caused and done, but of the vindictive damages claimed. This instruction should have been given.

For the reasons given, the judgment must be reversed, and the cause remanded, that a new trial may be had in conformity to this opinion.

SCOTT, SHELDON, and CRAIG, J. J., dissenting.

We concur in the reversal of the judgment, but not in the opinion of the majority of the court.

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The second instruction was as follows:

"If the jury find for the plaintiff they are instructed that in addition to the actual damages to which the plaintiff is entitled, the jury may give her what is called exemplary damages to any amount, not exceeding the sum of two hundred dollars."

We do not regard this, or the first instruction for the plaintiff as justly open to the criticism, that they inform the jury that exemplary damages may be given without proof of actual damage. And if they admitted of any doubt in that respect, it must have been fully removed by plaintiff's 9th instruction, as follows: "The court instructs the jury that they cannot assess any exemplary damages unless they first find that the plaintiff has sustained actual damages, under the proof and instructions of the court."

We agree that where there is but anguish or pain of mind suffered and nothing more, they do not constitute a cause of action.

That was the decision in the Ohio case cited. But where a cause of action in other respects is shown, we are not prepared to say, that mental suffering, produced in consequence of the intoxication of a husband or father, might not be considered upon the question of exemplary damages. And so to upon that question, the facts mentioned in defendant's 12th instruction refused might properly have been taken into consideration.

It is held in the above case that where the legislature adopts substantially the law of another State, that the presumption is, that the previous construction of the statute by the courts of such State, is also adopted, and that the presumption is, that the legislature in adopting the statute in question, adopted the ruling of the Ohio court in *Mulford* v. *Clewell*, 21 Ohio St., 191, but it would seem that the court intend such construction to apply only to civil remedies under the statute, for the reason that in prosecutions by indictment under the statute, the court hold that the construction given to the Ohio statute, in *Miller* v. *The State*, 3 Ohio, 47, is inconsistent with the spirit and policy of our laws, *McCutchen* v. *The People*, (Ante 90; *Streator* v. *People*, 85,) this distinction must be borne in mind by the practitioner. In the case of *Mulford* v. *Clewell*, 21 Ohio St., 181, it was held that in an action against the vendor of spirituous liquors for injuries to the "person" of the plaintiff, occasioned by the drunkenness of the vendee, cannot be sustained without showing an assault or some actual violence, or some physical injury to the person or the health of the plaintiff, and that it is not sufficient to show mere mental anguish, disgrace, or a loss of society or companionship. And that in order to a recovery by the wife for injury to her "means of support," it is not necessary for the wife to show that she has been at any time, in whole or in part, without present means of support. It is enough that

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the means of her future support have been cut off or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. And the rule of damages in such case should be, not the amount of loss occasioned to the husband's estate, but the diminution, if any, thereby resulting to her means of present and future support. And when the action is to recover for injury to "property," of the wife, she may recover against the vendor of the liquor damages sustained by her by reason of the sale of her chattals by the husband, without first demanding the chattels of the vendee, or notifying him that she claims them to be her property; what the damages are in any given case, the legislature have seen proper to leave to the jury to determine; the court of Ohio, in the case of *Mulford* v. *Clewell*, *supra*, say, "A wife's means of support—her reasonable alimony or allowance for maintenance—is a matter quite well known to the law, and there is no good reason why the legislature should not submit the question of its amount and value, as it seems to have done by these statutes, to the determination of a jury under the instruction and supervision of the court." It is not necessary to prove that the injury resulted directly and immediately from the drunkenness and during its continuance, and not from insanity, sickness or inability, induced by intoxication. The health of the husband, and his ability to labor, is often to a greater or less extent the means of the wife's support. In many cases to destroy these is to destroy her means of support. To take away the husband's power to accumulate means of future support for his wife is within the meaning of the law to injure her in her means of support. To this measure of damages it would seem from the principal case, the jury may in a proper case give vindictive damages, but in order to recover vindictive damages, the plaintiff must prove actual damages, and further show that the sale was wilful, and with a knowledge of the habits of the vendee.

Supreme Court of Illinois.

JAMES A. CHASE, et als, *v.* DAVID STEPHENSON, et als.

1. The point in the bill in this case is, that appellants in order to keep some four colored children from attending the same school in the district that is provided for others, erected a small house on the same lot where the other school-house stands, and at the expense of the tax-payers propose to employ an additional teacher to instruct the colored children in this small building, separate and apart from the other children in the district, and these facts are substantially admitted by the answer.

2. The bill in this case is filed by four tax-payers of the district to prevent a misappropriation of the public funds.

3. The free schools of the State are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district between the ages of six and twenty-one years, regardless

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of race or color, shall have equal and the same rights to participate in the benefits to be derived therefrom.

4. While the directors have large and discretionary powers in regard to the management and control of schools in order to increase their usefulness, they have no power to make class distinction, neither can they discriminate between scholars on account of their color, race or social position.

5. Had the district contained colored children sufficient for one school, and white children for another, and had the directors in good faith provided a separate room for each, where the facilities for instruction were entirely equal, that would have presented a question not raised by this record, and upon which we express no opinion.

The attempt on the part of the directors to maintain a school solely to instruct three or four colored children of the district, when they can be accommodated at the school-house with the other scholars can only be regarded as a fraud upon the tax-payers of the district, any one of whom have a right to interfere to prevent the public funds from being squandered in such reckless and unauthorized manner.

Opinion of the court by

CRAIG, J.—This was a bill in chancery filed by appellees against appellants, in the circuit court of McLean county.

The cause was heard upon bill, answer and exhibits, and a decree rendered that appellants, directors of a certain school district, be perpetually enjoined from occupying or using the building named in the bill, for the purpose of carrying on a school for colored children exclusively, at the expense of the district.

The bill was originally filed for the purpose of restraining appellants from erecting a school house twelve feet wide and fourteen feet long, for the exclusive use of educating four colored children in the district; before the injunction was served, the building was completed.

Appellees then filed a supplemental bill, in which they charged that after the completion of the building appellants employed a teacher and have kept a school in the building for no other purpose than to teach two colored children in the district. That appellants have given the teacher a warrant on the township treasurer to pay for her services, out of the school funds.

It is further alleged that appellants will, unless enjoined, continue to occupy the building erected as a school house at the public expense, for no other purpose than to educate two colored children, separate from the other children in the district.

It is further alleged that there is ample room in the school

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house which was erected three years before, in the same lot, to accommodate all the children in the district.

Several questions of minor importance have been raised by appellants which it is unnecessary to consider.

The point in the bill in this case is, that appellants in order to keep some four colored children from attending the same school in the district that is provided for others, erected a small house on the same lot where the other school house stands, and at the expense of the tax payers propose to employ an additional teacher to instruct the colored children in this small building separate and apart from the other children in the district, and these facts are substantially admitted by the answer.

This bill is filed by four tax payers of the district, to prevent the directors from a misappropriation of the public funds in which in common with the public, they have a direct interest.

It is insisted by appellants that under the provision of the statute that declares that the directors shall establish and keep in operation for at least six months in each year, and longer if practicable, a sufficient number of schools for the accommodation of the children in the district over the age of six and under the age of twenty-one; that they may adopt all necessary rules and regulations for the management and government of the schools gives them the power and fully sustains their action in this case. The free schools of the state are public institutions, and in their management and control, the law contemplates that they should be so managed that all children within the district, between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom.

While the directors very properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position.

If the school-house was too small to accommodate all the scholars in the district it would have been eminently proper for the directors to have enlarged the building, but this they did not see proper to do, and it is apparent from the record that the erection of the small house on the same lot where the school-house stood was

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not on account of the incapacity of the school-house to accommodate all the scholars in the district, but the sole and only object seems to have been to exclude the colored children in the district from participating in the benefits the other children received from the free schools.

Had the district contained colored children sufficient for one school, and white children for another, and had the directors in good faith provided a separate room for each, where the facilities for instruction were entirely equal, that would have presented a question not raised by this record, and upon which we express no opinion.

But the conduct of the directors in this case, in the attempt to keep and maintain a school solely to instruct three or four colored children of the district, when they can be accommodated at the school-house with the other scholars of the district can only be regarded as a fraud upon the tax-payers of the district, any one of whom have a right to interfere to prevent the public funds from being squandered in such a reckless, unauthorized manner.

As we view the case we perceive no error in the decree of the circuit court. It will therefore be affirmed.

Decree affirmed.

The question of the rights of colored children to attend the public schools in the State of Indiana, came before the Supreme Court of that State, in the case of Cory Carter, decided in April last, but not yet reported. The question involved in the case were the rights of colored children to go to the public schools, and the constitutionality of certain sections of the school law of the State. The case was upon an application for a mandate to compel the school officers of Lawrence township to admit the children and grand-children of Cory Carter, (colored) to the common schools of that township, no separate school having been provided for their benefit. A demurrer was filed to the application, and also a motion to quash. After a description of the case the opinion reads as follows:

"Great ability and research have characterized the arguments upon the motion. I shall not follow the counsel over the wide field they traversed in argument. I shall limit myself to the statements of a few propositions which seem to me to support the conclusion to which I have arrived. The ultimate question in the case to be decided is this. Have the children residing in the different townships in the State, in which no separate schools have been organized for colored children, a right to attend the schools organized in such townships in common with white children. On the 28th day of July, 1866, the 15th amendment became a part of the Constitution of the United States. That amendment ordained that all persons born or naturalized in the United States, and subject to the laws and penalties thereof, are citizens of the United

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States, and of the States wherein they reside. Art. 8, Sec. 1 of the Constitution of the State of Indiana reads: "Knowledge and learning generally diffused throughout a community being essential to the promotion of free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvements, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all." This expression "equally open to all" includes at least all citizens, and the system of common schools is composed of the various district schools of the State. At the date of the 14th amendment to the Constitution of the United States, the State of Indiana had in operation a system of common schools wherein tuition was free to white children under twenty-one years of age, they being citizens of the State, and on the taking effect of the amendment the several schools comprising that system, by virtue of the section above quoted from our State constitution, became open and free to colored children also, being under twenty-one years of age. As that amendment placed them in that class of citizens, they had the right to enter and attend those schools, until reasonably convenient separate schools, substantially equal in educational advantages were provided for them by the State, and whenever in any township such schools are not provided for them by the State, colored children being citizens, under twenty-one years of age, still retain the right conferred upon citizens' children to attend the common schools equal with white children in such locality." The principal case does not decide whether or not in cases where there is a sufficient number of colored children within the age prescribed by law to justify the establishing of a separate school for colored children, and the directors or board of education, as the case may be, shall in good faith, and for the general welfare of the schools establish a separate school for such colored children; that they may not do so, the Supreme Court of Indiana, it would seem, think that such separate schools might properly be established.

Supreme Court of Illinois.

IVORY H. PIKE v. SAMUEL COLVIN.

1. Trover may be maintained in certain cases against an officer levying upon property by virtue of an execution.

2. An execution only protects any officer to the extent that he obeys its command.

3. If the property does not belong to the defendant in execution, he incurs liability; if it does belong to him he must levy if he knows the fact, or can know it by the exercise of proper diligence, and unless he does so he incurs liability. He must perform his duty whatever the danger of suits or liability may be.

4. Forms of action in what cases may be maintained.

5. Levy subordinate to mortgage, when the mortgage is legal and binding.

6. Until breach of condition, the mortgagor holds contingent interest, that is liable to levy otherwise when the mortgage becomes forfeited.

7. When the mortgage provides that the mortgagor may retain the possession

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until default in payment, unless seized under execution, &c., if levied on he may possess himself of it by replevin, or if he fail to do so, and it is sold he may recover it from the purchaser, who will be entitled to the surplus, if any remains, after paying the mortgage debt.

8. If the mortgagee reduces the property to possession before a levy, or if he takes from the officer after a levy, in such case the creditors' only remedy is by garnishment against the mortgagee; this applies to mortgages, providing for sale.

9. A justice of the peace may keep a special docket for the entry of the record of chattel mortgages.

10. A general description of personal property that will enable the same to be readily identified is sufficient.

11. The interest of such mortgagor of property in his possession, by the terms of the mortgage is subject to levy and sale unless the mortgagee shall try the right of property, or replevy the same, and unless he does proceed in this manner, the officer is justified in selling whatever interest the defendant in execution has in the property, hence the action of trover will not lie against the officer.

12. On a demand, and refusal by the purchaser, the mortgagee as against him, may maintain either replevin or trover. This was an action of trover.

STRAIGHT & STRAIGHT, for Appellant.

ROWELL & HAMILTON, for Appellee.

Opinion of the court by

MR. JUSTICE WALKER, J.—It is contended that trover will not lie for the recovery of property wrongfully levied under an execution, but the owner is compelled either to replevy or try the rights of property under the statute. This is not the law.

When a sheriff or constable having an execution against one person, levies upon the property of another person, he becomes a wrong doer and his execution is no protection. It only protects him to the writ, and no further. The writ only commands him to seize the goods and chattles of the defendant in execution, and when he goes beyond the command of the writ, he becomes liable as though he had acted without any writ.

Such an officer having a *fieri facias* is compelled to act at his peril. If the property seized is not that of the defendant, he urs liability by levying and taking the property. On the other hand, if the property is that of the defendant, and he knows of it or can know it by reasonable effort, or is required by the plaintiff to levy on it, and he fails or refuses to do it, he becomes liable to the plaintiff in execution. He may frequently be placed in peril, as if he levies he will be sued by the claimant, and if he refuses, by the plaintiff in execution.

But like all other officers, he must perform his duty, whatever

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the danger of suits and liabilities may be. Because he is armed with an execution against the property of one man, he does not thereby derive immunity for seizing the property of another. Where an officer seizes the goods of some other person than the defendant in execution, the owner may maintain an action, and tresspass is the usual remedy of the owner, but trover may be maintained in many cases as well as case.

The writ forming no justification.

In the modern practice, replevin may be employed in all such cases, and as an additional remedy, the owner may resort to the more speedy and less expensive remedy, of a trial of the right of property, under the statute.

Some of these remedies may be resorted to in all such cases, and others in some of them.

Counsel are mistaken when they suppose *that* a trial of the right of property is the only remedy in such cases. The statute does not make it so, and the uniform practice has regarded the statutory remedy as simply cumulation to that given by the law.

In the case of *Beach* v. *Derby*, 19 Ill., 617, it was held that the levy of an attachment is subordinate to the rights of the mortgagee, when the mortgage is legal and binding. The rule has been followed in other cases, and from the application of the rule in the spirit, it must be held to apply with equal force to levies under executions.

Until a breach of the condition in the mortgage, the mortgagor holds a contingent interest in the property that is liable to levy and sale on execution or attachment, and the purchaser becomes the owner to the extent only of the mortgagor, and succeeds to all his rights.

But when the conditions of the mortgage become forfeited the title to the property becomes absolute in the mortgagee, and he then is invested with the legal title, and may proceed under the mortgage to sell if required, by the mortgage, and after paying the mortgage debt, pay the surplus, if any, to the person designated in the mortgage. After the maturity of the debt, or the failure of the condition upon which the mortgagor may retain possession, the mortgagee has the legal right to reduce the property to possession, and having done so, he has the legal right to retain it, and an exe-

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cution or attachment cannot deprive him of it. See *Prior* v. *White*, 12, Ill., 261. *Merrit* v. *Niles*, 25, Ill., 283.

When the mortgage provides that the mortgagor may retain the possession until default in payment, unless seized under attachment, where the mortgagee may take the property into possession if levied on under such a writ he may at once possess himself of the property by a writ of replevin. Or, if he fail to do so, and it is sold, he may recover it from the purchaser who will, on its sale, be entitled to the surplus if anything remains after the payment of the mortgage debt.

If, however, the mortgagee reduces the property to possession before a levy, or if he takes it from the officer after the levy, in such case the execution creditor's only remedy is by garnishee process against the mortgagee. He can by that means reach any surplus in his hands, but cannot deprive him of the property or its possession, because he has acquired it legally under a contract which is l wful.

What we have here said applies to cases where the possession by terms of the mortgage remains with the mortgagor, and when it provides that the mortgagee shall sell the property and pay the surplus to the mortgagor.

It is objected that the mortgage was invalid because the justice of the peace who took the acknowledgement of the mortgage, did not make the entry required by the statute, in his general *docket*, but in a special docket or book expressly for such entries. We fail to perceive any force in this objection. It is a substantial compliance with the statute, and enables creditors and purchasers to require notice of the mortgage as readily or more so than if it had been placed upon his general docket, and no reason is urged why it should not have the same effect, except we are asked to give the statute the narrowest possible construction. Neither justice or policy require such a construction.

It is next urged that the description of the property embraced in the mortgage is too uncertain, and it was error to admit evidence to identify the property. It would seem to be a proposition that all could see on its mere announcement that it is almost if not entirely impossible to describe personal property with such certainty as not to require indentification.

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Where there are in the country, doubtless many mules of the same general color and about the same age, could any one make a description so minute and accurate as to enable any person to know it from others of similar eye, color and size. Counsel have not even suggested that it may be done, and has not attempted to show that it can.

There is no force in this objection, the description being as particular as the law requires. It is so particular that it can be identified as that described in the mortgage, and answers the general description. The interest of the mortgagor in this property was subject to levy and sale under the execution in the hands of appellant. Appellee having failed to try the right of property or replevy it, the officer was authorized to sell it subject to the mortgage, as he seems to have done. If he abused his process, or wrongfully aided in depriving appellee of his property so that it became lost to him, he might no doubt have his action on the case, but the officer was and is protected by the command of his writ in selling whatever interest the defendant in execution held in the property, and hence the action of trover will not lie.

Appellee has, so far as this evidence shows, the right to reclaim the possession of the property, and subject it to the payment of his debt, and may no doubt maintain replevin for it against the purchaser or person having it in possession, or as the title has vested in appellee, he may, after demand and refusal, maintain trover against the person having its possession.

We have no hesitation in saying that this action was misconceived, and the judgment of the court below must be reversed.

Judgment reversed.

Circuit Court of Sangamon County, Illinois.

THE PEOPLE OF THE STATE OF ILLINOIS v. THE CHICAGO & ALTON RAILROAD COMPANY.

1. The office of a bill of exceptions, when the same should be signed, and when party is entitled to have the same signed.

Opinion by

ZANE, J.—The defendant, by its attorneys, presents to the court, for the signature and seal thereof, what purports to be a bill

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of exceptions, which is, in substance, that on May 10, 1874, a writ of *certiorari* was issued from the United States Court for the Southern District of Illinois, directed to this court and delivered to the clerk thereof, commanding it to certify and seal to that court the record and proceedings in this suit; that this court refused to obey such writ, and, on motion of plaintiff, set the cause down for trial; that on May 23d, 1874, a jury was impanneled to try the cause, whereupon the defendant, by its attorneys, presented the following protest:

STATE OF ILLINOIS, } In the Circuit Court,
SANGAMON COUNTY. } May Term, A. D. 1874.

The People of the State of Illinois v. *The Chicago & Alton Railroad Company.*

The defendant in the above entitled cause, for the purpose of objecting to further proceedings in this cause, and for no other purpose; and being, as the defendant claims, in this court for said purpose and none other, the defendant objects to further proceedings in the cause, and also to the admission of the schedules prepared by the railroad commissioners of said State in evidence, and also objects to all other evidence offered as testimony. And said defendant excepts to the admission of all said evidence, and to the several instructions of the court, not waiving thereby any right to claim that said cause has been removed from said court.

STUART, EDWARDS & BROWN, and HAY, GRNENE & LITTLER,
For Defendant.

That the court ordered the protest filed. The names of the witnesses, the questions propounded to them, the answers given, and the schedules of maximum rates of charges for the transportation of passengers and freight on the railroad of the defendant in evidence is also stated. The defendant then states in this bill that the foregoing was all the evidence in the case, and that to all which it then and there, by its protest objected, and that the court overruled the objection; that the jury returned a verdict for the plaiutiff for the sum of $3,000, and that the court entered judgment for plaintiff on the verdict for the amount so found.

Since the service of the writ of *certiorari* the defendant's counsel have refused to appear in this cause except as friends of the court, and to file its protest, at such times they have always insisted that the cause was no longer pending herc; that the writ of

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certiorari had removed it to the United States court. The plaintiffs insist upon their legal rights, and refuse to consent to anything by which they may lose any advantage gained.

The office of a bill of exceptions is to preserve the rulings of the court, the objections and exceptions thereto, the motions and evidence with reference to which the rulings of the court are made, and to make them a part of the record, in order that the appellate court may see whether the rulings were correct or erroneous.

According to the well settled rules of practice, what is the duty of the court as to signing and sealing the bill tendered?

Section 59 of the practice act provides:

"If during the progress of any trial in any civil cause either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow such exception, and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause."

The converse of the proposition of law stated in this section is, if a party does not allege an exception to the opinion of the court, and reduce the same to writing during the progress of the trial it is not the duty of the judge to allow such exception, and sign and seal the same. The supreme court of this state has repeatedly held that a party wishing to avail himself of an exception to a decision of the court, must except at the time the decision is made, and the bill must affirmatively show that the exception was taken at the time. In practice, however, the exception is merely noted, and the bill is afterwards settled.

The defendant insists, however, that it did object in this case to the introduction of all the evidence, and that the court overruled such objections, and that it excepted by the same protest to such rulings. If the filing of the protest had the effect which the defendant insists upon, then a defendant may insist that the case is not in court, and at the same time recognize it as being there. The defendant may get the benefit of not appearing in a cause, and the benefit of appearing at the same time. The protest would enable the defendant to put in objections before the cause is stated or any evidence is offered the jury, and then retire from the court room, which shall apply to the introduction of all the evidence as it is afterwards offered, and require the rulings of the court thereon, and except to such rulings as there may be made without assigning any reason therefor. No rule of law can be found which authorizes such a practice. I therefore decline to sign and seal the bill of exceptions tendered in this cause.

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Supreme Court of Illinois.

JAMES H. LEWIS v. JOHN D'ARCY.

1. Where a mortgage contains a clause, giving the mortgagee the right in the case at any time before the indebtedness secured by the mortgage becomes due, feeling himself "unsafe or insecure," to take and sell the property, will when the same is levied on by virtue of an execution, authorize such mortgagee to elect to treat the condition as broken, and to take possession of the property by replevin, affirming, *Bailey* v. *Godfrey*, 54 Ill., 507.

2. The mortgagor in such case has such an interest in the property as is subject to levy and sale. But the right of the mortgagee cannot be defeated by the levy of an attachment or execution, although the levy may have been rightfully made while the property was in the hands of the mortgagor, still the mortgagee's right to make his election to reclaim the property, would prevail against the officer making the levy as well as the mortgagor.

3. The mortgagee upon taking possession is compelled to offer the property for sale at once, and the surplus, after paying the debt secured by the mortgage, the remainder will be subject to the levy made by the officer.

This was an action of replevin to recover the possession of property levied upon by virtue of an execution against the mortgagor.

C. H. Wood, and Samuel T. Fosdick, for Appellants.

J. R. Kinnear, for Appellee.

Opinion of the court by

Mr. Justice Scott:—The property involved in this action had previously been owned by Owen Sullivan. It had been mortgaged to appellee to secure a *bona fide* indebtedness. While in the mortgagor's possession his interest in the property was levied upon by the appellant acting as a constable by virtue of two writs of attachment—the property taken into his possession, and thereupon this action was brought in replevin by appellee to recover possession.

The mortgage contained a clause giving the mortgagee the right in case he should at any time before the indebtedness secured by the mortgage became due, feel "unsafe or insecure" to take immediate possession and sell the property.

The property by the terms of the mortgage was to remain in the possession of the mortgagor until the indebtedness secured should become due or unless the mortgagee should for any reason feel "unsafe or insecure" elect to take immediate possession.

The property having been levied upon by the officer and taken into his possession, the mortgagee in accordance with the provis-

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ions of the mortgage elected to treat the conditions as broken, and sought to reclaim the possession. This we think he had a clear right to do. As was said in *Bailey* v. *Godfrey*, 54 Ills., 507, by the express terms of the mortgage, the mortgagee was invested and was made the sole judge of the happening of the contingency when he would elect to take possession of the property. It had been levied upon and was about to be exposed to sale. No doubt if the sale had taken place the property would have been bought by different purchasers and scattered to different portions of the country.

These facts afforded the mortgagee ample reason to feel "unsafe and insecure" as regard to his debt. The contract between the parties is recognized in the law as valid, and no reason is perceived why he could not as lawfully take possession of the property for this condition broken, as for non-payment on maturity of the indebtedness secured by the mortgage.

It is insisted that inasmuch as the mortgagor by the terms of the mortgage had the possession, he had such interest in the property, as was subject to levy and sale. This is no doubt true where the mortgagor has the right to retain the possession for a definite period. This is the doctrine of *Beach* v. *Derby*, 19 Ills., 617, and *Spaulding* v. *Mozier*, 57 Ills., 148. The property was conditionally conveyed to the mortgagee, and is only in the permissive possession of the mortgagor which may be terminated at any time for condition broken or when the mortgagee may feel "unsafe or unsecure" in regard to his debt. His right to take possession cannot be defeated by the levy of an attachment or execution. Although the levy may have been rightfully made while the property was in the hands of the mortgagor. Still the mortgagee's right to make his election to reclaim it would prevail against the officer making the levy, as well as the mortgagor himself.

There is no hardship in this rule. The mortgagee upon taking possession would be compelled to offer the property for sale at once, and when his debt was satisfied, the remainder no doubt would be subject to the levy made by the officer. If it should require the sale of all the property to make the mortgagee's debt, the attaching creditor would not be injured, for the reason his levy was only upon the interest of the mortgagor, and the sale would show he had

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no interest. In this view of the law, the demurrer to the replacation to appellants second special plea was properly over ruled, and the judgment must be affirmed.

Judgment affirmed.

JUDGE WOOD and SAMUEL I. FORSDICK, } ATTORNEYS FOR LEWIS, APPELLANT.

A. R. KIMLAR, ATTORNEY FOR JOHN DARCY, APPELLEE.

The importance of the two foregoing cases demand more than a passing notice. The principles decided have been asserted and controverted ever since the decision of the case of *Prior* v. *White*, 12 Ill., 261. In that case the court say, "It has been held that in case of a chattel mortgage, when under a provision in the mortgage the mortgagor retains the possession and use of the property, he has such a legal interest in the property as may be seized and sold on an execution against him—the purchaser under the execution succeeding to all the rights of the mortgagor and no more, *Bailey* v. *Burton*, 8 Wendall, p. 347. Where, however, the possession is transferred to the mortgagee, then the mortgagor has but an equitable interest in the chattel, which is not subject to an execution at law, *Marsh* v. *Lawrence*, 4 Cow., 491." If the property, by the terms of the mortgage is to remain with the mortgagor until default in payment, without any other provision that the mortgagee may take possession, the mortgagor would have such an interest as could be levied on and sold by virtue of an execution or attachment, and the mortgagee can only take possession before default in payment, when the mortgage contains some one of the provisions authorizing the taking of possession of the property. In the case of *Barbour, et als* v. *White, et als*, 37 Ill., 164, it was held that where a chattel mortgage provided, that on the happening of certain contingencies, the notes secured by it, though not due by their terms, should become due and payable, and the mortgagee *may elect* to take possession of the mortgaged property; that he is not compelled to take possession in order to preserve his lien, but has his election either to treat the notes as due, or let them stand on their original terms, as he may desire, the court say, "The clause was inserted in the mortgage merely to give the mortgagee additional security, and if he does not deem it necessary to avail himself of his privilege of claiming payment of his notes sooner than they are due, by their face, no other person is injured or has a right to complain." If he does not exercise his right in this regard, under the principles announced in the principal case, of *Pike* v. *Colvin*, the officer may proceed to sell, and upon default of payment by the mortgagor or purchaser, the mortgagee may recover the property from the purchaser. It must be borne in mind that the executions in both of the foregoing cases was levied subject to the mortgages, and when the levy is so made the plaintiff in replevin must próceed to sell the property, or so much thereof, as may be necessary to pay the mortgage debt, and then immediately turn over the surplus property to the mortgagor. The remedy, where there should remain a surplus of money in the hands of the mortgagee, would seem to be by garnishment, as stated in the case of *Pike* v. *Colvin*.

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District Court of Philadelphia.

MARKLEY *v.* WARTMAN, et ux.

The husband is liable for necessaries furnished to the wife for the support of herself and family, although she has been decreed a feme sole trader.

Plaintiff declared against husband and wife for coal furnished to the wife, averring that the coal was necessary for the support of the family of the husband and wife. To this the husband pleaded that the wife "is a feme sole trader, so declared by the decree of the court of common pleas, &c., and that this defendant is not liable for any debts incurred by her." The plaintiff demurred to this plea. Opinion by

MITCHELL, J.—It might be sufficient to say that the plea is defective in form, in not setting out that the wife was a feme sole trader at the time of contracting the debt, but we are clear that it is bad in substance, and therefore dispose of the case upon that ground.

At common law the husband, and he alone, was liable for the support of the family, and this liability extended to all necessaries furnished to the wife for that purpose. By the express words of the act of April 11, 1848, sec. 8, where debts are contracted for necessaries for the support of the family of any married woman, the creditor may sue both husband and wife, and after exhausting the husband's estate he may have execution of the wife's. The plaintiff by his declaration has brought himself clearly within this act.

We are unable to discover anything in the acts of 1718 and 1855, relative to feme sole traders, that shows any legislative intent to change in their case the common law rule, so carefully preserved in the act of 1849. On the contrary, the act of 1718 expressly provides that where it is made to appear to the court in which any execution is returnable, that the wife, acting as a feme sole trader, has "laid out money for the necessary support and maintenance of herself and children, in such case execution shall be levied upon the estate of such husband, to the value so paid or laid out." And again, in section 3, if the husband remain absent so long that his wife and children "are like to become chargeable to the town," then the estate of such husband shall be liable to be taken in exe-

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cution to satisfy any sums the wife or guardian shall necessarily expend for their support and maintenance.

The act of 1855 makes no change in the respective liabilities of husband and wife ; it merely extends the operation of the act of 1718 to other cases than that of absence of the husband at sea, and refers for the privileges and liabilities of a feme sole trader to that act: 20 P. F. Smith, 498.

We think it is clear, therefore, from that rule of the common law, and the plain legislative intent of every act on the subject, that the primary liability for necessaries for the support of the wife and family is upon the husband, whether the wife be entitled to the privileges of a feme sole trader or not.

These privileges are for her assistance and protection, not for his, who has disregarded his natural and legal duty, and sought to escape his just burdens.

The precise point involved in this case does not appear to have been decided by the Supreme Court, but it is necessarily involved in the decision of the converse proposition, that the wife is not primarily liable, made by this court in *Sheetz* v. *Cleaver*, 8 Phila., 3, affirmed by the Supreme Court in 20 Smith, 496.

Judgment for plaintiff on the demurrer.

See Statute of Illinois, act of 1874; Gross St., vol. 3, p. 229.

Supreme Court of New Hampshire.

TO APPEAR IN VOLUME 51, NEW HAMPSHIRE REPORTS.

HALE & A. *v.* EVERETT & A.

1. The term Christian in our constitution is used in its ordinary sense to designate one who believes or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament.

2. The term Protestant is used in the same instrument in its ordinary sense, meaning to include all Christians who deny the authority of the Pope of Rome,—Christians in this country and in Western Europe being divided into Roman Catholic and Protestant.

3. But neither the term Roman Catholic nor protestant is broad enough to include any who do not, nominally, at least, assent to the truth of Christianity as a distinct system of religion ;

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a Mahometan, a Jew, a pagan, or an infidel cannot properly be called either a Catholic or a Protstant, not being a Christian.

4. The political or conventional use of the word Christian, denoting one who assents to the truth of the doctrines of the religion of Christ, or who, being born of Christian parents or in a Christian country, does not profess any other religion or belong to any of the other religious divisions of men, is the sense in which the word is ordinarily used in constitutions and statutes and legal documents, and referring to those commonly known as nominally Christian, rather than to those who, professing the faith of some particular church, are termed Christians, in the theological or sacred sense of the term.

5. But when the children of Protestant parents, or those born in a Protestant country, renounce that religion, and voluntarily elect and adopt and profess some other religion, they cannot any longer be reckoned or assumed to be of the protestant religion; and so of all the denominations of Christians, and all other systems of religion.

6. By the act of 1819, all power to build meeting-houses and to support religious teachers was taken from the towns where it had been placed by the law of 1791, and was conferred upon religious societies; and any religious sect, as well as any denomination of Christians, was authorized to form such a society.

7. Under the acts of 1819 and 1827, religious sects or denominations of Christians were alone authorized to form religious societies, and the limited corporate powers that were conferred upon them did not in any way take away or change their character as sectarian or denominational societies.

8. When a society, of a particular religious sect or denomination, is formed with a strictly sectarian or denominational name descriptive of the fundamental doctrines of the sect to which it belongs, it will be presumed that it was constituted for the purpose of promoting the vital and fundamental doctrines of such sect or denomination.

9. In such case, where a conveyance is made to, or a trust created for the benefit or use of such religious society, by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support,

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the denominational name may be a sufficient guide as to the nature of the trust, so far as respects doctrines which are admitted to be fundamental.

10. In such case, those having control of property held in trust for the benefit of such religious society, may be restrained from applying the property, or the use of it, to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination, at the time, and immediately after, such trust was created.

11. Where the original trustees, appointed by the founder of a religious charity or trust, applied the fund to the support of certain religious doctrines, and that application had been long continued, and had always been acquiesced in by the founders of the charity or trust, a court of equity will not allow such application to be changed or interferred with, unless such change is clearly required by the plainly expressed intention of the donor.

12. It is not the province of courts of justice to decide or to inquire what system of religious faith is most consistent, or what religious doctrines are true, or what are false, in any case, and it seldom becomes necessary for courts to discuss or to examine the creeds, or confessions, or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders.

13. A Congregational society is usually made up of the church with which it is connected, and of those who worship with the church and assist in supporting the preaching and public worship of the church; and though the minister is settled by the society, he becomes the pastor of the church as well as of the society, and the society generally has no creed or published religious opinions distinct from the church; and to find what are the religious opinions of a Congregational society, we must look at the creed, or confession, or doctrines of the church with which it is connected, which is the center and foundation of the whole. This holds true of all who adopt the distinctive Congregational polity, whether known as orthodox Congregationalists, Baptists, and others, or those known as liberal Congregationalists, such as Unitarians, Universalists, and others.

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14. In case of a division of a religious society or corporation, where both parties still adhere to the tenets, doctrines, and discipline of the organization, the property should be divided between them in proportion to their numbers at the time of the separation.

15. Members who secede from a church organization or a religious society, thereby forfeit all right to any part of the property, rights, or privileges of such church or society.

16. Whether there has been a secession from a church or religious society is a question of fact, to be settled upon evidence of the acts and intention of the parties.

17. Deists, theists, free religionists, and other infidels, though they may be Unitarians in some sense, are not Unitarian Christians.

The history and law of religious societies in the United States, would form the subject of an instructive and useful book. It is not proposed in this note to enter into a discussion of the law applicable to church property, but simply to refer the profession to the law. In the April number, 1873, American Law Register, will be found a very able article upon the law of religious societies and church corporations in the State of Ohio courts. Lawyers, theologians and laymen, are frequently called on to consider the legal rights, powers and duties of different churches, and to arrange, or consider church titles, contracts, rights for remedies, for religious societies. Hence, the importance of the principal case which had we the space, we should have been glad to publish in full; and in this note we can only refer the profession to the law. In the June number of A. L. R., will be found an article discussing the law of religious societies and church corporations in general, and the same article is continued in the September number, 1873. These articles were written by the Hon. William Lawrence, one of the oldest members of the profession in the State of Ohio, and now a member of Congress from the Bellefontaine District. An examination of the head notes in the principal case, and the articles above cited, will enable the profession to form a correct conclusion upon almost every question that may arise, pertaining to church property and church rights.

ABSTRACT OF RECENT DECISIONS OF THE SUPREME COURT OF ILLINOIS.

CITIES—SIDEWALKS.

A party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have averted by the use of reasonable precaution. The court below refused the following instruction: "The court instructs the jury, that if the jury believe from the evidence, that Allin street was the nearest route from the shops, where plaintiff's son worked, to his boarding house, then the plaintiff's son was not bound to travel another

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route, even though he knew that the sidewalk in Allin street was out of repair." The court say, "Had the court given this instruction as it was prepared, it would have been in effect telling the jury the plaintiff's son might properly pass over the sidewalk, however dangerous it might be, with full knowledge on his part of its dangerous character; this is not the law, *Lovenguth* v. *The City of Bloomington.*

MARRIED WOMEN—REPLEVIN.

At common law the husband is presumed to own all personal property in possession of the wife, while they are living together. The act of 1861 was not designed to overcome the presumption of the common law in that respect. The wife in order to maintain replevin against an officer levying an execution against the husband, and to enable her to claim the benefit of the act of 1861, must bring her case within its provisions, and if she acquired the property during coverture, in good faith from any person other than her husband, this is an affirmative fact for her to establish, and the law requires her to show that the money or property that went to pay for the property in question, was her own separate property, acquired in good faith from some person other than her husband. *Reeves* v. *Webster.*

PROMISSORY NOTES—ASSIGNMENT WITHOUT RECOURSE.

In a suit by second indorsee against the makers of a promissory note, assigned without recourse, for full value before maturity, it was held that an assignment before maturity for value, without recourse, does not in itself raise a suspicion of an infirmity in the consideration of the note, and is not in itself sufficient to prompt inquiry into the consideration, who is about to take such note for value by indorsement, without recourse. This case is distinguishable from the cases of *Russell* v. *Hadduck*, 3 Gill., 233, and *Murray* v. *Beckwith*, 48 Ill., 391.

Stephenson v. *O'Neal*, *et al.*

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THE

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WESTERN JURIST.

AUGUST, 1874.

LIFE INSURANCE—INSANITY—INTEMPERANCE—SUICIDE.

An insurance upon life is of comparatively recent date, and has grown with the growth and wealth of the country, until the associated wealth of the life companies of England and this country are enabled to take a policy upon the life of every party who may apply to them for insurance, and their responsibility is unquestioned in the commerce and business of the country. A creditor may insure upon the life of his debtor, or may insure upon his own life for the benefit of his family. In no event can the person upon whose life the policy is effected be benefited by his own death. Death, whether by disease, by accident, or the result of insanity, is in each case, within the general object of the policy. The terms "suicide," and "dying by one's own hand," mean the same thing, and are generally used synonomously, some companies using in their policies one form of expression, and other companies using the other form. Dying by one's own hand is but another form of expression for suicide. The case of *Borradaile* v. *Hunter*, reported in 5th Manning and Granger, p. 639, found also in 2 Bigelow, Life and Accident Insurance Cases, is the leading English case upon this question. In this case the policy of insurance contained a proviso, that in case "the assured should *die by his own hands*, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was

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drowned; upon an issue whether the assured died by his own hands the jury found that he "voluntarily threw himself into the water knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time he was not capable of judging between right and wrong." Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong, did not prevent the proviso from attaching; that moral or legal responsibility was irrelavent to the issue. The court add, "It may very well be conceded that the case would not have fallen within the meaning of the condition, had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death in either case had ensued. In these, and many other cases that might be put, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." This authority was followed in *Clift* v. *Schwabe*, 3 Common Bench, 437, where it was substantially held that the terms of that, the condition included all acts of voluntary self destruction, and whether the party is a voluntary moral agent, is not in issue. The Supreme Court of the United States in the case of *Life Insurance Co.*, v. *Terry*, 15 Wallace, 585, in reviewing these cases say, "These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases, from Coke and Hale onwards; Coke said 'A little madness deprives the lunatic of civil rights or dominion over property and annuls wills.' But to exempt from responsibility from crime, he says, 'complete ignorance of the knowledge of right and wrong, must exist.' Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil, of which the converse is ignorance of knowledge of right and wrong, of good and evil." Lord Lyttleton held the test to be the state called *compos ment's* or sound mind. Lord Erskine (in defense of Hadfield), defined it to

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be the absence of any practicable delusion traceable to a criminal or immoral act. In Pritchard on the Different Forms of Insanity, (vol. 1, p. 16), will be found the somewhat lengthy definition of insanity, by Lord Lyndhurst. The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue." "In *Hartman* v. *Keystone Insurance Company*, (21 Penn., State 466), the doctrine of *Borradaile* v. *Hunter*, was adopted with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy. In *Dean* v. *Mutual Life Insurance Co.*, (4 Allen, Mass., 96), the courts of Massachusetts held substantially the doctrine of *Borradaile* v. *Hunter*. In Kentucky, in *St. Louis Life Insurance Co.* v. *Graves*, (6 Bush, 268), the court were divided upon the question of the soundness of *Borradaile* v. *Hunter*, but held unanimously that, where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided.

In *Cooper* v. *Massachusetts Life Insurance Co.*, (102 Mass. p. 227), the doctrine of *Dean* v. *American Life Insurance Co.*, was affirmed, the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the influence and impulse of insanity, and that his act of self destruction was the direct result of his insanity. In *Mimick* v. *Insurance Co.*, (10 American Law Register, New Series 102), McKennan, Circuit Judge of the United States, for the western district of Pennsylvania, held that if the assured comprehended the physical nature, and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act. On the other hand, *Eastabrook* v. *Union Insurance Co.*, (54 Maine 224), the judge at the trial instructed the jury "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover." This decision was sustained by the Supreme Court of Maine. In the State of New York, the question arose in *Breasted* v. *Farmers Loan and Trust Co.*, (4 Hill 73). In an action upon the policy, the defendants pleaded that the deceased

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committed suicide by drowning himself in the Hudson River, and died by his own hand. To this the plaintiff replied that the assured was "of unsound mind, and wholly unconscious of the act." The defendant demurred. The Supreme Court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea. The case afterwards came before the court of appeals of that State, (4 Selden 299), when it was held that the provision in the policy had reference to a criminal act of self destruction, that the self destruction of the assured while insane, and incapable of discerning between right and wrong, was not within the provision. In the case of *Gay* v. *The Union Mutual Life Insurance Co.*, (cited in 2 Bigelow, Life and Accident Insurance Cases, 4), it was held that if the deceased was conscious of the act he was committing, if he intended to take his own life, and was capable of understanding the nature and consequences of it, the policy was void, but if the insured destroyed himself while acting under an insane delirium which overpowered his understanding and will, or if he was impelled to the act by an uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow, was the result of a careful deliberation between Judges Woodruff and Shipman, at a Circuit Court of the United States, held by them jointly.

In his work on Insurance, Mr. Phillips, (§ 894), after citing the cases, closes thus: "And I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract, would render a person incapable of occasioning a forfeiture of a policy under this condition."

In Georgia 41, Law 338, it was held that where the husband as the agent of his reputed wife, represented to an insurance company that she was his wife, and effected an insurance on his own life in her name, for her benefit, and the truth of the case was that the marriage was void, by reason of the reputed wife having a former lawful husband living at the time of the second marriage, the policy was not void, by reason of the illegality of the last marriage, unless it should further appear that the husband and reputed wife knew at the time the policy was effected, that at the time of their supposed marriage the lawful husband of the wife was living, and the marriage illegal, and failed to inform the company

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of the fact. It was further held that if the assured drank to intoxication, and while in this condition, by accident or mistake, took an overdose of laudanum and died therefrom, it was not a dying by his own hand, in the sense of these words as used in the policy, even though the mistake or accident be in some sense occasioned by the drunkeness; but if he took the laudanum with intent to destroy his life though it be but the intent of a drunken man, this would be a dying by his own hand. See also to the same effect, *Miller* v. *The Mutual Life Insurance Co.*, 31 Iowa, 316. In the case of *Terry* v. *Life Insurance Co.*, 1 Dillon, C. C. R. page 403, it was held by Miller and Dillon, J. J. that insanity on the part of the assured which irresistably impelled him to take his own life or existing to such an extent as to render him incapable of forming a rational judgment with respect to the act of self destruction, will so far excuse him as to render the company liable, notwithstanding the policy contains a condition avoiding liability therein in case the assured shall "die by his own hand." It will be observed by an examination of the foregoing authoritities, that there is a conflict which cannot be reconciled. The Supreme Court of the United States, in the case of *Life Insurance Co.* v. *Terry*, 15 Wallace, 590, lay down the following rule: "We hold the rule on the question before us, to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death, is not within the contemplation of the parties to the contract, and the insurer is liable." In this case the counsel for the defendant requested the court to instruct the jury thus:

"First. If the jury believe from the evidence in the case, that the said George Terry destroyed his own life, and that at the time of self destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences

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which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

"Second. That if the jury believe from the evidence, that the self destruction of the said George Terry, was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action."

The court refused to give either of said instructions, and charged as follows:

"It being agreed that the deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand,' within the meaning of the policy, and that they are therefore not liable. This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which by the general terms used in the policy, self destruction was to have, namely, to avoid the policy.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law *prima facie* or otherwise, that self destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry, or distressed in mind, formed the determination to take his own life because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand, within the meaning of the policy."

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The court, Miller and Dillon, J. J. after a full review of the authorities, gave the above charge to the jury, and the same was affirmed by the Supreme Court of the United States, *supra.*

See also note to the case, 1 Dillon, 403, and authorities there cited: At the March term 1874, of the Circuit Court of the United States, for the eastern district of Michigan, in the case of *Moore* v. *The Conneticut Mutual Life Ins. Co.*, reported in The American Law Times, and Reports, vol. 1, p. 319, which was an action on insurance policy involving the same questions, LONGYEAR, J. charged the jury as follows: "Gentlemen of the jury: After the very full, able and exhaustive argument of counsel on both sides in this case with the full, and I feel entirely fair, discussion of all the details of the facts occuring in it, it seems unnecessary that I should detain you any longer than to lay down those rules of law which are to be your guidance in your deliberation. I shall therefore proceed as briefly as possible to lay down those general rules with perhaps some few additional remarks, but in doing so, shall detain you as short a time as possible.

"This suit is brought by Lotta A. Moore, the wife of Everett W. Moore, to recover the amount of a policy issued by the defendant to her on the life of her late husband, for $5,000. The contract itself is not disputed, but there is a clause in it that raises the whole question in this case, and that clause is as follows: 'If the assured shall die by his own hand," &c., this policy shall be void, and of no effect.'

"That the assured took his own life there is no dispute. The simple question is, whether the circumstances under which he took his own life are such as to bring the case within the provision of the policy—that is, was it within the sense of the words 'die by his own hand,' as these words were used in the policy. These words, 'die by his own hand,' mean the same as suicide in general terms. That was decided in the case of *Life Insurance Co.* v. *Terry*, 15 Wallace, 591, which has been laid before you here, and it has been seen all the way through in the argument of this case, and from the books which have been read, that the discussion of this very clause, and the words similar to it proceed upon the same principles, and upon the same general considerations as suicide, and consequently I call your attention in the first place, to the defini-

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tion of suicide, as bearing upon the questions here under consideration, and I will read that from the fourth of Blackstone, page 189. Suicide was placed as long ago as the time when Blackstone wrote, and still stands there by the English law, and also so far as it is recognized and provided for or against in this country as felonious homicide. It is placed in the same category as murder, and I read from Blackstone, as follows:

'Felonious homicide is an act of a very different nature from the former" (that is, of excusable homicide), "being the killing of a human creature of any age or sex without justification or excuse. This may be done either by killing one's self or another man.

'Self-murder, the pretended heroism but real cowardice of the Stoic philosophers, who destroyed themselves to avoid the ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with the cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offence,—one spiritual in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for, the other temporal, against the king, who hath an interest in the preservation of all his subjects,—the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony—a felony committed on one's self; and this admits of accessories before the fact as well as other felonies, for if one persuades another to kill himself, and he does so, the adviser is guilty of murder."

"Now comes the definition of suicide, which I desire to call your particular attention to:—

'A *felo de se*, therefore, is he who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death; as if attempting to kill another he runs upon his antagonist's sword, or shooting at another the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime.'

"That this party was of years of discretion there is no dispute. The only dispute in this case is as to his being in his senses when

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he committed the act. In regard to this, sanity is presumed. All persons are presumed to be sane until the contrary is proven. Insanity must always be proven by the party claiming an exemption on account of it. The fact of suicide is not of itself evidence of insanity. That, however, is not disputed, and I need not stop to discuss it to any length whatever.

"This covers the first and second of the defendant's requests to charge, which I will here read for the purpose of disposing of them.

"The defendant requests the court to charge the jury:—

1. 'It being admitted that the assured, Everett W. Moore, destroyed his own life, it is a presumption in fact that he died 'by his own hand,' and in the sense of the policy, and the burden of proof is upon the plaintiff to show that he came to his death under such circumstances as makes the defendant liable under the policy.'

"This is correct, and I so charge you.

2. 'There is no presumption arising from the act of self-destruction that it was the result of insanity, and the burden of proof is upon the plaintiff to prove that at the time of the death of the said Everett W. Moore he was insane to such a degree that the defendant is liable upon the pol cy.'

"This is simply the proposition that I have already stated, with, however, perhaps a very little qualification. The charge, as I give it to you, is that suicide is not of itself evidence of insanity, standing alone by itself; and the burden is upon the plaintiff in this case to show that insanity existed, and that it was of such a nature and degree as to make the company liable. I will therefore next call your attention to the degree of insanity that will not or that will excuse or exempt the party from the provision in the policy.

"First, it is not every degree of insanity that will exempt the party taking his own life from the consequences of the act. A person may from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life be considered in a certain sense insane; but these alone are not enough to exempt him from the consequences of self-destruction, where he committed the act deliberately and intelligently.

"In regard to this it is sufficient to explain that an error of judgment as to the commission of the act is not sufficient to exempt the party,—a mere error of judgment; for we may say that all men,

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perhaps, who decide to take their own lives, when they do it deliberately and intelligently, commit an error of judgment. That is not sufficient to exempt them.

"Mental disorder amounting to insanity must appear in order to exempt the party. But while these causes which I have named are not sufficient alone (such as anger, dread of exposure, a desire to escape from the ills of life, &c.) to exempt the party from the consequences of suicide, there undoubtedly may be circumstances under which these, operating together with other circumstances upon the mind may produce a disorder of the mind. And that is for the jury to determine in every case. Where they have produced a disorder of the mind, then it is that which you are to consider, and not the mere peculiar causes which produce it. And in this connection I will notice the third, fourth, and fifth of the defendant's requests, and the plaintiff's first request.

"The plaintiff requests the court to charge the jury:—

'That if the death of the deceased was not his voluntary, intelligent act, he did not die by his own hand within the meaning of the policy.'

"That is correct as a general principle, and I so charge you.

"The defendant's third request is as follows:—

'If the assured being in possession of his ordinary reasoning faculties, and from shame, pride, a dread of exposure, or a desire to escape from the ills of life, intentionally took his own life, there can be no recovery.'

"This I have already explained to you.

"The fourth request is:—

'If the assured was embarrassed in his business, or had drawn checks without having any funds upon which to draw, or had committed forgeries and exposure was imminent, or was in a distressed state of mind from this or some other cause, and for any or all of these reasons he formed a determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable.'

"This is undoubtedly correct, and I so charge you. If for these reasons he took his own life in the exercise of his usual reasoning faculties, then the company is not liable.

5. 'It is not every kind or degree of insanity that will so

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far excuse the act of self-destruction as to make the company liable.'

"I have already covered this in my charge. I merely read these now for the purpose of disposing of them.

"Thus far there is no great difficulty in applying the law to any given case, or to this case. You will next proceed to the question of the degree of insanity that will excuse. Here the difficulty in cases of this kind begins, and your real burdens in this case commence. The court can aid you but little in this respect, further than to lay down the general principles by which you are to be governed. These have been well defined by the highest court of judicature in this country, by whose decision this court and jury must be governed. They are well set forth in the requests of the respective cousel.

"I will now read the sixth and seventh requests of defendant's counsel, which are as follows:—

6. 'To have this effect (that is, that insanity shall have the effect to excuse the act) the mind must be so far deranged as to have made the deceased incapable of using a rational judgment in regard to the act of self-destruction.'

"That is correct, and I so charge you.

7. 'To make the defendant liable, the plaintiff must prove either first the assured was impelled by an insane impulse which the reason that was left him did not enable him to resist, or secondly that his reasoning powers were so far overthrown that he could not exercise them on the act which he was about to do.'

"This request is correct law, and I so charge you.

"The plaintiff's second request virtually covers the same ground, and I will simply read it for the purpose of showing that fact, and for the purpose of disposing of it.

'If the deceased was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable.'

"That is correct, and I so charge you.

"I will now dispose of plaintiff's third request, as to which there is some dispute between the counsel. The request is as follows:—

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'If the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effect of the act he was about to commit, or if he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties to the contract, and the insurer is liable.'

"The last part of the request is included in the second request, and it can be just as well stricken out, and I will leave it out for the purpose of perspicuity in considering this particular request. I will read it again, leaving out that last clause:—

'If the death was caused,' &c., 'when his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act he was about to commit, the company is liable.'

"That is the request which the court has been asked to give. The criticism upon this request by defendant's counsel is, in the first place, that although so declared by the supreme court of the United States in the case of *The Insurance Company* v. *Terry*, above cited, it was merely dictum; that it was not included in the points presented to the court for decision, and consequently is not binding upon this court: and that it is not good law. If that declaration of the supreme court was within the question presented, it is absolutely binding upon this court and upon you. We will therefore first consider that question.

"I think the learned court of appeals of New York, which has made the same criticism on the decision of the supreme court (*Van Zandt* v. *Mut. Benefit Life Ins. Co.*, Ins. Law Journ., March No. 1874, p. 208), and the learned counsel in this case, have overlooked one peculiar feature of the case of *The Insurance Company* v. *Terry*, and that is the refusal of the court below to charge as requested. This precise question was presented in the request to charge, which the court refused to give, and the charge which was given by the court below must be read in connection with and in the light of the requests which had been made and were refused; and that request presenting this exact question of the moral character of the act and of moral insanity, in my opinion was clearly and

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fully before the supreme court. For the purpose of sustaining that position I will read the request which was refused and in response to which the charge was given, which was given.

"The second request on the part of the defendant was: 'That if the jury believe, from the evidence, that the said self-destruction of said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit, and the consequences which would result from it, then in that case it was wholly immaterial that he was impelled thereto by insane impulse which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action'—thus presenting the exact question upon which the supreme court passed and which is embodied in the plaintiff's third request.

"It is true the court below did not include in express terms in the charge given this question of moral responsibility or of moral insanity, but the terms used in the charge which was given are broad enough to include that; and in view of the fact that the court had been requested to charge otherwise, and then using expressions which are broad enough to include that, it is fair to presume that it was so included, and that the jury so understood.

The language of the charge as given was as follows: 'If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable.'

"This charge must be read in the light of the request which had been refused, and which expressly included the question of moral insanity.

"I therefore hold that the question was disposed of finally by the supreme court in a manner absolutely binding upon this court. I therefore give the plaintiff's third request as stated:

"These words, 'general nature, consequences and effect of the act,' have been somewhat criticised, and I deem it my duty to make a few remarks in regard to them, as they are used in that decision. They do not refer to the act, in my opinion, by which the deceased took his life. They are broader than that; they refer to the entire act,—not only the act by which he took his life, but the

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result of it. That is, they cover the 'suicide,' the accomplished fact; and that is what is referred to as the 'general nature, cônsequences and effect of the act,'—that is, the general nature of the suicide, of the murder committed upon one's self, the enormity and effect of it; otherwise it would be inconsistent with what precedes; because, if it was his voluntary act, he knowing and intending that his death would be the result, then it would be a simple absurdity to put the question to you whether, under those circumstances, if he did not understand the general nature and consequences of the act, the company would be liable. That would be, I say, absurd. Those words then have a broader meaning, and cover the entire accomplished fact,—the act of suicide.

"In this view of the case, gentlemen of the jury, it is entirely unnecessary for me to detain you with any remarks or considerations growing out of my own views or opinions as to the correctness of the law as established by the supreme court, and which has just been given you as contained in the plaintiff's third request. I will, therefore, pass it with a single remark, that a considerable time ago, after that case of *The Insurance Company* v. *Terry* had been decided in the court below, but before it was decided by the supreme court, I had occasion to pass upon the same question in the case of *Wolff* v. *The Insurance Coopany*, and then decided as I now find myself enabled to decide, and my views have not changed upon that subject since that time.

"Although I find it nowhere distinctly so stated, yet from the discussions upon the subject, I gather that these defences, as they may be called, to the crime of suicide, are placed upon the same ground so far as this question of the moral character of the act is concerned, as defences for murder. It has always been held that a person killing another when so insane as not to be capable of judging between right and wrong should not be convicted of murder. What I mean is, the principle is the same, although the standard or degree may be different. This is virtually so stated in *The Insurance Company* v. *Terry*, 15 Wallace, 591. This ability to judge between right and wrong refers to a principle of the human mind. It does not refer to any tenets of religious belief. It does not depend at all upon what a man's religious belief may be, or whether he has any or has not. It does not depend upon whether he be-

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lieves in a God and a future state, or the contrary. It refers to that principle which is planted in every human breast—that sense of right and wrong which exists in the mind of the disciples of Buddha or of Confucius, or of the followers of Mahomet or of Christ, and in the mind of him who believes in none of them. It is that sense of right and wrong that we all feel and realize and understand. It is true that sense is stronger in some persons than in others, but it is that to which reference is had in this connection.

" The defendant's eighth request I will now consider.

"*Counsel for defendant.* That is already virtually passed upon by your honor; it is simply refused, as I understand it.

"The COURT. Very well, that is all that need be said on that subject.

" Defendant's eighth request was as follows: 'That the evidence in this case does not tend to show that degree of insanity on the part of the assured which excuses the act of self-destruction and justifies the jury in rendering a verdict for the plaintiff, therefore the verdict must be for the defendant.'

Gentlemen of the jury, I have done about all that I can do in this case, and have made these questions as clear as they can be made with the ability I have; and if it is not clear in your minds what your duty is, it rests in the difficulty of making it so, more than in the efforts which have been made by the counsel on both sides, and by the court. The propositions of law that have been stated to you are such as there is no dispute about between counsel, with the exception of the last, and that has been determined by the supreme court, and we must obey. This case, gentlemen of the jury, rests upon presumptions entirely; that is to say, it rests upon the conclusions which you are to draw as to the existence of a certain fact from the proof of the existence of other facts. For insanity and the degree of it are not susceptible of positive proof in a case like this. There are instances in which it may be proven with a great degree of certainty by positive proof, such as in the case of a raving maniac; but here it rests upon presumptions entirely, and your decision of the case depends upon conclusions which you shall draw as to the fact of sanity or insanity from the facts proven. You start out with the presumption of sanity. The burden of proof is upon the plaintiff to prove the contrary. If the plaintiff has sus-

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tained that burden, and has so proven to your satisfaction, then she may be entitled to recover at your hands. If she has not, then the defendant is entitled to your verdict.

"The first question for you to determine is, do the presumptions arising from the facts proven overcome the presumption of sanity. The trust test is whether the facts proven, from which you are asked to find insanity, are inconsistent with sanity. If they are so inconsistent with the exercise of a sound mind that you cannot reasonably attribute such facts thereto, then they are evidences of insanity, but not otherwise.

"Now there is a great range of indications as to soundness or unsoundness of mind, all the way from the ravings of the maniac, which are patent to the eye and the ear, down to the retiring melancholic, who seeks to conceal the worm which is gnawing at his mental vitality. These indications, I say, range all the way between these; and here the difficulty exists in coming to a correct conclusion as to what facts do indicate; but it is peculiarly, and entirely, and exclusively within your province, and I leave it to you without even rehearsing the facts or in any manner deciding them.

"Evidence is that which carries conviction to the mind. You are to look at all the facts which have been proven, and to bring to bear upon them your best judgment, aided by your experience and observations in life and considerations to which you have access, without, however, going outside of the proofs in the case, and decide for yourselves whether, in the first place, Everett W. Moore, at the time he took his own life, was sane or insane. Secondly, if you shall find that he was insane, then whether under the charge that has been already given he was so insane as to excuse or exempt him and this plaintiff from the consequences of the prohibition or disability in the policy. I recommend to you in your consideration to adopt that order. First, the question of insanity in general terms—was he insane? If you decide that he was not insane, then, of course, that is the end of it, and your verdict must be for the defendant. If you shall decide that he was insane, you must go then a step farther, and inquire whether his insanity was of that degree and kind that you are satisfied that he was driven by an irresistible impulse to commit the act, or that he was incapable of exercising his reasoning powers as to the moral character, general effect, and

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consequences of taking his own life. If, after finding that he was insane, you shall come to the conclusion that he was thus insane, the plaintiff is entitled to recover at your hands; otherwise not. If your verdict shall be for the plaintiff, it will be for $5,000, and interest from the 30th day of December, 1873, to and including the present date.

"*Counsel for defendant.* I desire, growing out of what your honor has said, to make another request:—

'That the mere fact that the assured did not fully understand and appreciate the moral character of the act of self-destruction does not so far excuse the act as to make the defendant liable.'

"The COURT. I cannot see how this varies in any manner the charge as already given, and I therefore refuse this request, with the simple addition that the jury are to take this refusal into consideration, in connection with the charge which has already been given upon that subject.

"The jury returned a verdict for the plaintiff for the full amount claimed."

It will be noticed that there is no presumption of law *prima facie* or otherwise, that self destruction arises from insanity; and it would seem to be the true rule to hold, that the presumption of law is that the party was sane at the time of the commission of the act, unless it shall be proved otherwise.

Chief Justice Williams, in the case of *St. Louis Mutual Life Insurance Co.* v. *Groves*, 6 Bush. Ky., at page 290, says: "The sanity of the suicide, like that of the homicide, is legally presumed, and the evidence of insanity must be sufficiently potent, to overcome both this legal presumption and the evidence of sanity, and establish to the satisfaction of the jury insanity. *Graham* v. *Commonwealth*, 16 B. Mon. 587, *Keid* v. *Commonwealth*, 5 Bush., 362. The mere prohibited act can rarely if ever do this." But see contra to cases cited by the learned Judge. *Hopps* v. *The People*, 31 Ill., 385; *Chase* v. *The People*, 40 Ill., 352. The fact that the decedent committed suicide is before the jury, and they are to consider the fact that the decedent did commit suicide in connection with other proof, which in order to a recovery, must satisfy the jury that the party was in the state of mind at the time he committed the act, that will authorize a recovery. The Supreme

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Court of Maine, in the case of *Estabrook* v. *The Union Mutual Life Insurance Co.*, 54 Maine, 229, *supra*, say: "That a jury would be likely to regard suicide as proof of insanity, does not effect the conclusion. If suicide is to be regarded as evidentiary of insanity, as it unquestionably is in most cases, then they generally arrive at correct results. If it is not properly to be so regarded it may be an argument against a trial by jury, that the tribunal is one which allows itself to be governed by its prejudices rather than by the proofs, but it is none against the construction of the policy that death by the hands of the assured whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule." For additional authorities upon the questions here discussed see authorities cited in the briefs in case in 6 Bush. *supra*. See also, *Comas* v. *Covenant Life Ins. Co.*, Supreme Court Mo., western division, revision for May, 1874, page 159. For provisos avoiding policies issued by the principal London insurance companies prior to the decision in the *Borradaile* case *supra*, see note to the case, 44 English Common Law Reports, 340. A large number of the English insurance companies, and I believe some of the American companies have added to the provisos here considered, the words "die by his own hands, whether sane or insane." What effect these additional words may have, or whether the same will be upheld by the courts is not here considered. In the case of *Mallory* v. *Travellers Ins. Co.*, 47 N. Y., 52, where by the terms of the policy, the sum insured was to be paid if the insured shall have sustained personal injury caused by any accident * * * and such injuries shall occasion death, etc. It was held that if a wound received by deceased, being produced by an accident did not cause death, but did cause him to fall into the water where he was drowned, then the death was accidental, and the defendant was held liable. And it was also held that, where it appears from the facts that a violent death was either the result of accidental injuries, or of a suicidal act of deceased, that the presumption of law is that the death was accidental, and that the party did not commit suicide. In a very recent case upon a policy of insurance upon the life of plaintiff's testator, the policy contained this condition, "in case he (the assured) should die by his own hands, the policy should be void, null and of no effect."

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The assured committed suicide. Plaintiff claimed and gave proof tending to show that the claimant was insane at the time. Held, that to take the case out of this condition the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse, which he could not resist; it is not enough that he was not conscious of the moral obliquity of the act. *Breasted* v. *F. L. and T. Co.*, 4 Hill, 73, S. C. 8, N. Y. 299, and *Dean* v. *M. L. Ins. Co.*, 4 Allen, 96, and the case of *Life Ins. Co.* v. *Terry*, 15 Wallace, 580, *supra*, distinguished.

Upon the trial a medical witness called by plaintiff was asked the question: "Assuming that a person had that form of insanity which you denominate melanchclia, and had committed suicide would you attribute that suicide to the disease?" This question was admitted under objection. Held, error as the question did not call for information peculiarly within the knowledge of an expert, but for an inference which was within the province of the jury to draw without being influenced by the opinion of the witness. *Vanzandt* v. *Mut. B. L. Ins. Co.* Ins. Law Journal, March No. 1874, p. 208. It would seem that the rule deducible from all the authorities would be, as held in the Vanzandt case above cited. The rule there laid down would seem to be in harmony with reason, and within the true meaning and spirit of the contract, containing the clause, "If the assured shall die, shall die by his own hand," &c., "this policy shall be void."

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Supreme Court of Illinois.

THE BOARD OF TRUSTEES OF TOWNSHIP 28, N. R. 2, E. of 3d P. M., OF WOODFORD COUNTY *v.* ELECTA S. DAVIDSON et als.

1. The Statute authorizing loans by the Township Treasurer, prescribes the form of the mortgage to be given as security, and declares that such mortgages shall be acknowledged and recorded, as required by law of other conveyances of real estate.

2. Courts of equity will not correct mistakes in or reform the deeds of married women, affirming *Moulton et. ux.* v. *Hurd*, 20 Ill. 137.

3. The form of mortgage required by the Statute, contains a covenant, that in case additional security shall be required, the same shall be given to the satisfaction of the Board of Trustees for the time being. Held, that in default of giving such additional security when required, that the mostgage may be foreclosed before maturity, by efflux of time.

4. The mortgage in this case dated Dec. 16th, 1867, held void, as to the wife, by reason of defective acknowledgment.

5. A mortgage, the name of the husband (grantor) in blank, held valid as to him when properly signed.

Opinion by

McAllister, J.:—This was a bill in Chancery brought in the Woodford Circuit Court, by plaintiff in error, against defendants to foreclose two mortgages upon real estate. The defendants were husband and wife. The mortgages were given to secure separate loans of school funds made to defendants by the township treasurer. The first mortgage was executed December 16th, 1867, to secure the sum of four hundred dollars, payable in four years with interest. It was signed, sealed and acknowledged by both defendants, although the name of the husband nowhere appears in the body of the instrument. The acknowledgement was taken by a justice of the peace, who certified that Electa S. Davidson, who was personally known to him to be the real person whose name was subscribed to the foregoing instrument, appeared before him and acknowledged the execution thereof, as her free act and deed for the purposes therein mentioned, and that said Ezra D. Davidson, husband of the said Electa S. Davidson, personally known to him, etc., and being examined separate and apart, and out of hearing of his said wife, and the contents being made known and fully explained to him, acknowledged said instrument to be his free act and deed; that he executed the same, and relinquished his dower, etc., volun-

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tarily and freely, without the compulsion of his wife, and did not wish to retract.

The statute authorizing loans by the township treasurer, prescribes the form of the mortgage to be given as security, and declares that such mortgages shall be acknowledged and recorded as is required by law for other conveyances of real estate. (Gross Statute, p. 702).

This acknowledgement is wanting in all the substantial requisites of the statute respecting the deeds of married women and for such defects this deed was absolutely void as to the wife. *Lindley* v. *Smith*, 46 Ill., 523.

The other mortgage was executed July 22d, 1868, by defendants to secure the re-payment of the sum of eight hundred dollars in five years, with interest, and is properly acknowledged. The bill alleges, and seeks to correct a mistake in the deed ; a court of equity will not correct mistakes in or reform the deeds of married women. *Moulton et ux.* v. *Hurd*, 20 Ill., 137. The bill in this case was filed before the sum secured by either mortgage was due by the efflux of time. The objection is made by defendants that although an action at law might be maintained upon the covenants, or to recover the amounts loaned, still a bill to foreclose the mortgage will not lie until the debt is due by lapse of time. To construe the statute upon which these questions arise, we must refer to some of its controlling provisions. The 57th sec. (Gross Stat., 701), prescribes the terms upon which loans of such public funds should be made. And amongst other things it is provided that for all loans of sums over one hundred dollars, and for more than one year security shall be given by mortgage, on unincumbered real estate, in value double the amount loaned, with a condition that in case additional security shall at any time be required, the same shall be given to the satisfaction of the board of trustees for the time being. The 58th section prescribes the form of the mortgage containing a covenant of the grantor to comply with the requirement to give additional security.

The 59th section declares that "upon the breach of any condition or stipulation contained in said mortgage, an action may be maintained and damages recovered as upon other covenants."

Then the 60th section declares that : "In all cases where the

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board of trustees shall require additional security for the payment of money loaned, and such security shall not be given, the township treasurer shall cause suit to be instituted for the recovery of the same, and all interest thereon, to the date of the judgment, provided that proof be made of the said requisition." These several provisions enter into every contract of loan made under the statute, and constitute as far as applicable, as much a part of the mortgage as if expressly incorporated into it.

When these two sections are considered together in connection with the other provision fixing the standard of security, it is very apparent that it was the intention of the 60th section to make the original debt become due for all the purposes of any remedy for its collection, immediately upon failure to comply with the requirement to give additional security.

The authority to require such additional security, is given by statute and the covenant contained in the mortgage to comply, vest the board of trustees with the discretion of determining when a case arises for the exercise of the power, and unless it is exercised fraudulently or under such circumstances of abuse or oppression as amounts to fraud, the propriety of the exercise cannot be made a subject of inquiry in the courts. It appearing in this case that the requisition for additional security was made and not complied with, we are of the opinion that a bill would lie to foreclose these mortgages. There is no evidence in the record sufficient to justify the conclusion that the power to make the requisition was fraudulently exercised or abused. The defendants answer avers that the legal title to the property mortgaged, was wholly in the wife, and that the husband had no interest except such as he had as a husband of a wife holding a separate estate. If this be so, it is perfectly clear that the security was far short of what the statute contemplated. The first mortgage was so defectively acknowledged as to be inoperative in respect to the estate of the wife, and the second as appears by the bill needed, reforming in a material particular which it is not competent to do so far as the wife is concerned.

Whatever obstacles there may be to relief, as against the wife, we can see no reason why the first mortgage was not operative upon whatever interest the husband had in the land, and the second mortgage may be enforced against the interest of both de-

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fendants unless there was some such mistake in the description of the land or terms of the instrument as would prevent. In which case a proper case being made, the instrument might be reformed as respects the husband although not as to the wife. There was no evidence upon this point. The husband by executing the first mortgage became bound by the covenants therein contained. The words, "and I do hereby covenant," would apply to him as well as to his wife who is named as sole grantor.

Upon the whole case we are satisfied that the court below erred in dismissing the plaintiffs bill altogether. The decree must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

It will be noticed that the mortgages in these cases were both executed prior to the act of March 27th, 1869, Laws of 1869, page 359. See note to the case of *Simmons* v. *Hervey*, page 33, Monthly WESTERN JURIST, as to the effect of the acts of 1869 and 1872, in relation to the acknowledgment of deeds and mortgages by married women.

Supreme Court, N. Y., Special Term, July, 1874.

IRENE TEIN v SOLOMON TEIN.

Indefinite and uncertain pleadings in action for divorces on the ground for adultery. The rule as to the time, place and person with whom adultery is alleged to have been committed.

The defendant in his answer averred that the parties with whom the adultery was committed are unknown to him, neither did he state the time or places. *Held*, that while he was perhaps warranted in not giving the names of the persons because unknown to him, he is not warranted in omitting to state the times and places at which the offenses were committed.

Motion to make fifth paragraph in answer more definite and certain "by stating time and the name or names and street or streets or place or places, and the exact dates with whom and where and when plaintiff has openly and notoriously prostituted herself for hire."

The complaint was in the usual form by a wife against her husband for a divorce *a vinculo* on the ground of his adultery.

The answer contained eight defenses, among others that plaintiff was not his wife, and that he was never married to her and deny-

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ing any act of adultery on his part. The *fourth* defense alleged that the plaintiff's name was not Irene Tein, but was Irene Ashton. The *fifth* defense was as follows: "That on the 20th day of March, 1869, the plaintiff was and ever since has been a common and notorious prostitute and has during all that time openly and notoriously prostituted herself for hire, and has during all that time, at divers places in the city of New York, committed adultery with divers men, but with what particular men or at what particular places in said city this defendant is now unable to state more definitely. The *sixth* defense was an admission by defendant that he had committed "adultery" with the plaintiff, but that she was his mistress and not his wife, and that he had never held her out as such to the world, but that all his friends and acquaintances knew plaintiff to be his mistress and not his wife. The *seventh* defense alleged that he was engaged to be married to a very respectable young lady of first-class standing in society, and the plaintiff becoming aware of the same threatened to expose defendant's "adulterous" intercourse with her, and he, fearing exposure, paid her the sum of eight hundred dollars and obtained from her a general release of all claims. The *eighth* defense charged that the action was only brought to extort money.

Upon motion Justice Donohue struck out the fourth, sixth, seventh and eighth defenses as irrelevant and redundant, holding that there were but two questions under the pleadings which were properly in issue and material. *First*, was the plaintiff the wife of the defendant? *Second*, if she was did plaintiff or defendant, or both, commit adultery.

George F. and *J. C. Julius Langbein*, for the plaintiff, for the motion.

William F. Howe, for the defendant, opposed.

LAWRENCE, J. The fifth paragraph of the answer must be made more definite and certain by stating the times when, and the places at which the plaintiff committed the alleged adulteries.

The adultery of the plaintiff must be set up in an answer in the same manner and must be accompanied with the same allegations as are required when the defendant is charged in a complaint with the commission of adultery. *Monnell* v. *Monnell*, 3 Barb. 236; and see *Army Mons.*, 17 Abb. 48.

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In *Hyde* v. *Hyde*, 4 Sandf. 622, are allegations "that the defendant in November, 1851, committed the offense in the city of New York with a female whose name is unknown to the plaintiff," was held to be insufficient, and it was further held, that "if the person be unknown the complaint should state specifically the place where the offense occurred and at a house specified or the like." In this case the defendant avers that the parties with whom the adulteries alleged were committed are unknown to him, and under the authority just cited he is, perhaps, warranted in making the allegation in that respect in the form in which it is made, but he is not warranted in omitting to state in his answer the times and places at which the offenses were committed.

Motion granted to the extent above stated, with $10 costs of motion.

I publish the above case published in the *Albany Law Journal*, for the purpose of calling the attention of the profession to the rule of pleading, that requires the charge of adultery to be distinctly stated in the bill or answer in cases of divorce. It is necessary to state the time, place and person with whom the adultery was committed. I have in practice, frequently found it difficult to state the issue or determine whether or not a definite issue was made by the pleading. It would seem under the authorities, that it would be proper if such is true to aver the time and place, and that the person with whom the adultery was committed is unknown, but a party is not warranted in omitting to state the time and place. In the case of *Monnell* v. *Monnell*, 3 Barb. p. 236, it was held that in suits for divorce, on the ground of adultery, feigned issues are only to be made up for the trial of the facts contained by the pleadings. The allegations must be expressly made on one side, and denied on the other, and those only are to be tried. And where the defendant makes a recriminatory charge of adultery in the answer, the charge must be such that the defendant, if innocent, as to entitle such defendant to a divorce, if substantiated on a bill filed. The adultery of the plaintiff, should be set up in the answer, in the same manner, and be accompanied with the same allegations as are required when charged in a blll. Such allegation will then form the proper subject of an issue. And in order for the party to succeed, such party must prove the charge as alleged. In the case of *Bokel* v. *Bokel*, 3 Edwards' Chancery Reports, p. 396, it was held on a bill for divorce, containing an allegation (and no other) of adultery with Emeline Morris, that it was not enough for the master to report that the act was committed with a woman whose name is unknown. That the charge in the bill must be proved as alleged in order to authorize a decree. Under our Statute Laws of 1874, chapter entitled Divorce, Myers' edition, page 158, provides that "The process, practice, and proceedings under this act shall be the same as in other cases in chancery, except as herein otherwise provided, and except that the answer of the defendant need not be on oath" While it is true that the statute does not require the answer to be on oath, yet the answer should state the charge distinctly, so that the replication would form an issue. See also, Puterbaugh's Chancery Practice and Pleadings, page and authorities there cited.

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Supreme Court of Pennsylvania.

WM. E. UDDERZOOK v. THE COMMONWEALTH.

It is proper in a homicide case to offer in evidence of identification the photograph of deceased—other evidence also properly admitted.

Error to the Court of Oyer and Terminer of Chester county.

Opinion by

AGNEW, C. J. July 2d, 1874:—This is, indeed, a strange case; a combination by two to cheat insurance companies, and a murder of one by the other to reap the fruit of the fraud. Winfield Scott Goss, an inhabitant of Baltimore, had insured his life to the amount of $25,000. He was last seen at his shop on the York road, a short distance from Baltimore, on the evening of the 2d of February, 1872, in company with William E. Udderzook, his brother-in-law, the prisoner, and a young man living near. They left him to go to the house of the young man's father. In a short time the shop was discovered to be on fire. After it was burned down a body was drawn out of the fire, supposed to be that of Goss. Claims were made upon the insurance companies, the prisoner being active in prosecuting them. On the 30th of June, 1873, the prisoner and a stranger, a man identified as Alexander C. Wilson, appeared at Jennersville, in Chester county, in this State, and remained over night, and the next day. In the evening, July 1st, the prisoner and this stranger left Jennersville together in a buggy. Next day, on being met, and asked what had become of his companion, the prisoner said he had left him at Parksburg. On the 11th of July, the body of a man, identified on the trial as W. S. Goss or A. C. Wilson, was found in Baer's woods, about ten miles from Jennersville, the head and trunk buried in a shallow hole, in one place, and the arms and legs in another. The stranger who was with the prisoner at Jennersville, identified as A. C. Wilson, was traced from place to place, living in retirement, from June 22d, 1872, up to within a day or two of the time when he appeared with the prisoner at Jennersville. During this interval the prisoner and Wilson were seen together several times under circumstances indicating great intimacy and privacy. Wilson has not been seen or

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heard of since the evening of July 1st, 1873, when he left Jennersville in company with the prisoner. The great question in the case was the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's woods, was that of Goss. All the bills of exceptions except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore on the same plate with a gentleman named Langley, was clearly proved by him, and also the artist who took it. Many objections were made to the use of this photograph, the chief being to the use of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature painted from life, and proved to resemble the person, may be sure to identify him, cannot be doubted, though like all other evidences of identity it is open to disprove or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photograph we see is not the original likeness, and its lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate called the negative, made sinsible by chemicals and printed upon by the sunlight through the camera. It is a result of art guided by certain principles of science. In the case before us such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but who had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photography as an established means of producing a correct likeness. The daguerrian process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a costomary and a common

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mode of taking and preserving views as well as the likenesses of a person, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate made by the rays of light through the camera are dependant on the same general laws which produce the images of outward forms upon the retina, through the lenses of the eye. The process has become one in general use, so common we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses. But happily the proof of identity in this case does not depend on the photograph alone.

Letters from Wilson, identified as the hand writing of Goss; a peculiar ring, belonging to Goss, worn upon the finger of Wilson; the recognition by Wilson of A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to Baltimore; and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss, independently of the photograph. The objection to the proof of Goss' habits of intoxication is equally untenable. True, the habit is common to many, and alone would have little weight, but habits are a means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury. It is unnecessary to follow the bills of exceptions in detail. They all relate to facts and circumstances bearing on the question of identity. If the bills of exception are many they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof. They are many links in a chain so long it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barnitz, and A. R. Carter, were unobjectionable. Whether they really could not identify the dark and swollen face of the corpse, it was not for the court to decide. The weight belonged to the jury. There was no error in permitting the jury, after their return into the court for further instructions, to take out with them at their own request, the teller's check, due bill and applications for insurance papers, which had been proven, read in evidence, and commented on in the trial. The appearance, contents, and handwriting of these documents were no doubt important to be inspected by the jury, who could not be expected to carry all these

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features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offense.

We discern no error in this record, and therefore affirm the sentence and judgment of the court below, and order this record to be remitted for execution.—*Pittsburg Legal Journal.*

Supreme Court of Illinois.

JOHN W. DOANE et. al. *v.* JOHN H. DUNHAM.

1. In cases of executory contracts the law gives the purchaser a reasonable time in which to make a fair examination, to see whether or not the property answers the character called for by the contract.

2. The distinction between executed and executory contracts, discussed and defined.

3. What is a reasonable time for the purchaser to determine whether or not the property answers the contract, is a question for the jury under all the circumstances.

4. If the purchaser fails to make the examination within such reasonable time. he will be precluded from offering them back and rescind the contract, and avoid payment on that ground.

5. In case of purchase by sample, or in cases of contracts for future delivery, the law will imply that the parties contemplated the property or goods to be delivered shall be of a fair and merchantable quality, and will raise a warranty to that effect.

6. But in case the purchaser fails to make the examination and offer to surrender the goods within a reasonable time, under all the circumstances, in case the property or goods did not answer the contract, such purchaser would still have the right to rely upon the warranty implied by law, in mitigation of damages under the general issue, and would only be liable upon a *quantum meruit* for the goods.

Opinion by

McALLISTER, J. :—This was *indebitatus assumpsit* by *Dunham* v. *J. W. Doane & Co.*, for a quantity of sugar sold and delivered. The latter pleaded the general issue. It appears by uncontradicted evidence that Dunham was the agent in Chicago for manufacturers of sugar in Boston and Philadelphia, and also sold on commission for parties in New York. That he kept a store in Chicago from which he was accustomed to sell sugars, to the wholesale dealers in that city by means of an agent of the name of Briggs, who visited the stores of the wholesale grocers every day

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soliciting orders, sometimes taking samples with him. Dunham having in store a lot of Mollar and Martin's powdered sugar. Briggs on one of his daily visits called at the store of Doane & Co., who were wholesale grocers, for orders; he had no sample; but Doane asked him if he had any powdered sugar; he replied that he had; Doane asked him whose it was; he said Mollar & Martin's, and his price was 13⅜ cents (per pound); Doane replied that he would not give it, but offered 13¼ cents for twenty barrels, which Briggs accepted. The stores of the respective parties were in the same city; but how far apart, does not appear, nor is it very material. According to the custom of the trade the contract was for thirty days time. No time was specified for the delivery of the sugar, but from the course of business it would seem to be at the option of the buyer; such right to be exercised however within a reasonable time. At the making of the contract there was no selection or setting apart, from the lot, of any specific barrel. The buyers two days afterwards sent their teamster to Dunham's store for the sugar contracted for, and twenty barrels were delivered by the latter. It was kept by the buyers in their store without any examination or anything done to it for nearly twenty-six days, when it was examined and found to be of an unmerchantable quality. It appeared to have originally been powdered sugar, and Mollar & Martin's; but was caked to an almost stony condition, was wholly unfit for the purposes of powdered sugar, and worth considerably less for any purpose. When its condition was discovered, the buyers notified Dunham and offered to return it, but he declined to receive it back. On the trial the plaintiff claimed the full contract price, on the ground that there was no warranty express or implied, while on the other hand the defendants insisted that there was a warranty which was broken; for that reason they had the right to return it on discovery of the defect, and such offer defeated the right of recovery.

The jury gave the plaintiff the full contract price, and the court overruling a motion for a new trial, gave judgment on the verdict. From the instructions given, and some that were asked and refused, it appears that the case was tried upon this theory of the law; that even if there was no fraud, but if there was a warranty of the goods, which was broken, the buyers had the right for

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that reason to rescind, offer to return, and that defeated the whole recovery, irrespective of whether this was an executed sale or an *executory* contract of sale, or whether there was any stipulation in the contract for a return or not. That doctrine was laid down by Lord Eldon in *Curtis* v. *Hanney*, 3 Esp. 83, A. D. 1800. But in the case of *Street* v. *Bley*, 2 Barn & Adol, 456, decided in 1831, Lord Tenterden Ch. J., reviewed the cases and the views of Lord Eldon were expressly repudiated, and it was held that when there is a warranty on sale of goods without fraud, and no stipulation in the contract, that the goods might be returned, the vendee has no right to annul the contract without the consent of the vendor; but in an action for the price the warranty and breach may be given in evidence in mitigation of damages on the principle of avoiding circuity of action. His Lordship also recognized a distinction between an executed sale and an executory contract for a sale, in which latter case it was held, the goods may generally be returned as soon as they are found not to satisfy the contract, if the purchaser have done nothing in the meantime beyond what is necessary to give them a fair trial. This case has been followed by numerous others in England, and is fully approved in New York, *Voorhees* v. *Earl*, 2 Hill, 288. *By the contract in the case at bar*, the price was to be paid and sugar delivered in the future. There was at the time of making it no selecting or setting apart of any specific barrels from the mass in store, so as to pass the property *in presenti*. The contract was therefore executory and the goods not purchased upon inspection. Under such circumstances the law will imply that the parties contemplated the sugar should be *of a fair and merchantable quality*, and will raise a warranty to that effect.

It was Dunham's duty, to deliver sugar that should answer the character, and be of the quality contemplated, bringing the average market price. Nothing short can be regarded as performance. *Babcock* v. *Trice*, 18 Ill., 420; *Misner* v. *Granger*, 4 Gilm., 69; *Howard* v. *Hoey*, 23 Wend., 350.

The barrels delivered to defendant's teamster were of Dunham's selection from the mass in his store. The contract being executory, the law gave the defendants a reasonable time in which to make a *fair examination, and see if the sugar answered the*

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character and quality of that called for by the contract. What is such reasonable time is to be determined upon by the jury in view of all the circumstances. If the defendant's failed to make the examination within such reasonable time, they will be precluded from the right to offer them back, rescind the contract, and avoid payment on that ground; but would still have the right to rely upon the warranty implied by law, in mitigation of damages the general issue, or in other words will be liable upon a *quantum meruit* for the goods. If on the other hand they retained the goods only a reasonable time for examination, and immediately upon discovering that they were not of the character or quality called for by the contract, they notified the vendor to take them back, then the contract was rescinded and no recovery could be had for the price. 2 Kent's Com., Marg p., 479, 480. *None of the refused instructions asked on behalf of the defendant's were proper.* But as we must reverse the judgment for error in the plaintiff's instructions, we shall not stop to point out those in the defendant's.

The third instruction for plaintiff told the jury, that as a matter of law there was in the sale of personal property, no implied warranty, that the goods sold are of any specific quality or goodness when the purchaser at the time of the sale has an opportunity to examine them if he chooses to do so, and the seller is not a manufacturer, and if the jury shall believe from the evidence that the plaintiff was guilty of no fraud or concealment and did not *specially* warrant the sugar, and there was an opportunity on the part of denfendant's to examine the sugar at the time they received it, and they failed or neglected to do so, but received it without objection, and plaintiff did not at any subsequent time agree to receive it back, and discharge defendant's from their indebtedness, or did not agree with defendant's that the latter should hold the sugar and sell it on plaintiff's account, then they should find for the plaintiff.

This instruction entirely ignores the distinction between a sale of *specific chattels* where the property passes in *præsenti*, and the case of an Executory contract, and was calculated under the circumstances of this case to mislead the jury in respect to the warranty implied in the case of an executory contract.

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It virtually tells the jury that in the absence of a fraud and *special* warranty, if there was opportunity to examine the sugar at the time defendant's received it, and they failed or neglected to do so, but received it without objection, then they were cut off from all defence, unless plaintiff had subsequently agreed to take it back and discharge them. We have seen that the law gave them a reasonable time which is to be determined upon by the jury. The instrucion is in conflict with that view and therefore erroneous.

The judgment must be reserved and the cause remanded.

REVERSED AND REMANDED.

Supreme Court of Illinois.

LOUIS WARNECKE et. al. v. JOHANN LEMBCA.

1. Bill to redeem from a sale made under a trust deed. The trustee named in the deed having died, the sale was made by his widow, the administratrix of his estate. It was provided in the trust deed, in default of the payment of the notes secured, &c., on the application of the legal holder, "John Rauscher or his legal representative," should advertise, sell and convey the land, as the attorney of the grantor.

2. The only question presented is, whether the administratrix of the deceased trustee could rightfully make the sale. Held, that she could not, and that only remedy was to apply to a Court of Chancery, to appoint a trustee to complete the execution of the trust, or to file a bill and foreclose the same, as in case of an ordinary mortgage.

Opinion by

SCOTT, Justice:—This bill was to redeem the land in controversy, from a sale made under a trust deed for default in the payment of the indebtedness thereby secured. The trustee named in the deed who was clothed with the power to make the sale having died, the sale was made by Walburga Rauscher, his widow, and the administratrix of his estate. It was provided in the trust deed in default of the payment of the notes secured, or any part thereof, on application of the legal holder, "John Rauscher, or his legal representative," should advertise, sell and convey the land as the attorney of the grantor.

The only question presented, material to the decision of the case is, whether the administratrix of the deceased trustee, could

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rightfully make the sale. The law is very jealous of this class of sales, and will permit no marked deviation from the authority giving the right. *Mason* v. *Ainsworth*, 58 Ill., 163.

The general rule is, the trustee himself must execute the power, and if by reason of death or incapacity he cannot do it, relief can only be had on application to a Court of Chancery, to appoint a trustee to execute the residue of the power.

It is claimed the "legal representative" of the trustee is designated by the express terms of the deed to make the sale on the application of the legal holder of the indebtedness. Who is the "legal representative," in the sense that term is used in the trust deed? is a question involving very grave difficulty. It is well known this term does not always have the same signification. Legal representative or personal representative in the commonly accepted sense, means administrator or executor. But this is not the only definition. It may mean heirs, next of kind or descendants; 2 Redfield on Wills, 68, 80, 81, *Delannay* v. *Burrett*, 4 Gill, 454, *Gulf R. R. and Banking Co.* v. *Brayan*, 8 S. & M. 234.

The sense in which the term is to be understood depends somewhat upon the intention of the parties using it, and is to be gathered not always from the instrument itself, but as well from attending circumstances. It will be observed these definitions of "legal representative," have reference exclusively to administration of estates, both testate and intestate, and the relation certain parties bear to deceased persons.

It seems to us most illogical to say the term "legal representative" as used in the deed comes within any of the definitions given. It will bear another construction, and one more in harmony with the intention of the parties using it. When found in instruments other than those relating to the administrations of estates, or the affairs of the deceased persons, it has been construed sometimes to mean assignees or a certain class of purchasers accordingly as it was supposed the parties must have understood it. Nothing could be more absurd than to suppose the grantor in this instance intended to use it in the sense of heirs or next of kind. They might be so numerous, or there might be minors, lunatic, or insane persons otherwise incapacitated to act, and it would be impracticable to have any execution of the power. Nor is it more

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reasonable to believe it was intended to use the term in the sense of administrator or executor. The administrator or executor, is the legal representative of the decedent, only as to the personal estate. The legal title to the real estate covered by the trust deed was in the trustee. It did not descend to the administratrix, and how could she convey that which she did not have? She was in no way connected with the title that was in the trustee, but was a stranger to it. She could not convey in the name of the trustee for he was dead, nor could she convey in the name of the grantor or her own name, for no such power was given. Where the trustees have the legal title and power of sale, they alone are competent to contract and make a good title to the purchaser. Perry on Trusts, sec. 787.

In *Delannay* v. *Burrett*, it was declared the purchaser of a pre-emption right is to be regarded as the "legal representative" of the original claimant, under the act of Congress granting such rights.

In the *Grand Gulf Railroad Banking Co.* v. *Brayan*, the same point was ruled that the term, "legal representative," as used in the act of Congress of March, 1803, touching pre-emption claims under the act, does not mean children or heirs only, it embraces also assignees, and grantees, who, in regard to the thing assigned or granted are the legal representatives of the assignor or grantor. The reasoning of the court is cogent and unanswerabie. Mr. Chief Justice Sharkey, in delivering the opinion said, "An "assignee or grantee is a legal representative of the assignor or "grantor in regard to the thing granted. If Congress had intend-"ed that heirs only should be entitled to represent the original set-"tler, it is remarkable that the word "heirs" was not used. Its "meaning is well known; it is the appropriate expression, when "those on whom the law casts the estate are spoken of. And as "Congress used a phrase more comprehensive we must suppose "other persons besides heirs were intended. General expressions "in law must be construed to have a general application, unless "there be a clear indication that they were intended to be *used* in "a restricted sense. Representative is one who exercises power de-"rived from another. The purchaser derives his power over the "estate from his vendor."

Had it been the intention of the parties to this deed that the

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heirs or administrator should execute the power in the event of the death of the trustee, it is a singular omission that no appropriate words were used to indicate which class of representatives was meant. And as the parties have used a term susceptible of a different definition, we must believe persons other than heirs or administrators were intended, especially when the enlarged interpretation will effectuate the purpose the parties had in view, and a more restricted and technical one will defeat it. It is agreeable to the analogies of the law, that the assignee or grantee having the legal title that was in the trustee, can execute the power; but it involves an absurdity to say a mere stranger to the title can. This is the doctrine of the cases of *Pardee* v. *Lindly*, 31 Ills, 174, and *Strother* v. *Law*, 54 Ills, 413.

The principle of those cases is that when the mortgagee or his assignee is empowered to sell on default being made, if the indebtedness thereby secured is assignable at common law, or by our statute, the assignee is the only party who can execute the power. It is for the reason, the assignee is the legal holder of the indebtedness, and the assignment carried with it the mortgage as the mere incident.

In *Hamilton* v. *Lubukee*, 51 Ills, 415, and in *Mason* v. *Ainsworth*, 58 Ills, 163, it was declared the equitable assignee of the indebtedness could not execute the power in his own name. He had neither the legal title to the estate mortgaged, nor the indebtedness. In the case we are considering the administratrix had neither.

It follows from the doctrine of those cases that the party in whom is the legal title to the mortgaged property or his assignee, or his grantee is the only proper party to execute the power.

Here the trustee was dead. There was no grantee or assignee, and hence no "legal representative" in the sense we suppose that that term must have been used in the deed. Therefore, there was no one who could rightfully make the sale. A new trustee should have been appointed to execute the power, or the trust deed should have been foreclosed by bill in chancery as an ordinary mortgage.

The sale by the administratrix being unauthorized by law did

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not bar the equity of redemption. The court properly held the premises subject to redemption, and its decree is affirmed.

DECREE AFFIRMED.

BREESE, C. J.:—I do not concur in the opinion. The deed of trust expressly authorizing the legal representatives to make the sale, it was properly made by the administratrix.

SHELDON, J.:—I concur with Mr. Chief Justice Breese.

At Chambers—McLean Circuit Court.

EXPARTE HENRY BEHERNS.

1. Habeas corpus, power of towns and cities, office of the writ.
2. The right of magistrates to imprison in default of payment of fines.
3. Power of courts to discharge and what may be heard on *habeas corpus* cannot review the judgment of commiting officer.
4. Practice when the record upon which the commitment is made is defective.

The courts in this State may by writs of habeas corpus and certiorari look into the record so far as to ascertain whether the judgment will sustain the imprisonment.

Opinion by

TIPTON, J.:—This is an application for a habeas corpus in which the petitoner alleges that he is the owner of a large amount of personal and real estate subject to execution. That no execution against his goods and chattels has been issued, and that the only writ issued upon the judgment, is the writ for his arrest, a copy of which is attached to the petition. The writ is substantially in the form of the writ in exparte Bolig. 31 Ill., 88. The petition further alleges that the petitioner is unjustly imprisoned in the jail of Ford county, by Edward L. Gill, sheriff and jailor of said county.

It is admitted that the petitioner was duly prosecuted and convicted before F. L. Cooke, a justice of the peace of that county, for the violation of an ordinance of the city of Paxton, prohibiting the selling and giving away intoxicating, malt, vinous, mixed or fermented liquors, within the limits of the city of Paxton. This ordinance provides: "That whoever by himself or herself, agent or otherwise, shall sell or give away in any quantity intoxicating, malt, vinous, mixed or fermented liquors, within the limits of the city of Paxton, without having first obtained a license or permit there-

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fore, from the proper authorities of the said city, shall upon conviction thereof, for each act of so selling or giving away any of said liquors, pay a fine of fifty dollars and cost of suit; and upon the order of the court or magistrate before whom such conviction is had, (and the said court or magistrate shall issue such order) be committed to the county jail of Ford county, or calaboose, or other place provided by said city for the incarceration of offenders, until such fine and costs are fully paid, *provided* the imprisonment shall not exceed six months for any one offense." Section seven of article five of an act entitled, "An act to provide for the incorporation of cities and villages." Laws of 1872, page 235, provides that, "In all actions for the violation of any ordinance, the first process shall be a summons, *provided* however, that a warrant for the arrest of the offender may issue in the first instance upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof, and any person arrested upon such warrant shall without unnecessary delay, be taken before the proper officer to be tried for the alleged offense. Any person upon whom any fine or penalty shall be imposed, may upon the order of the court or magistrate before whom the conviction is had, be committed to the county jail, or the calaboose, city prison, work house, house of correction or other place provided by the city or village for the incarceration of offenders until such fine and penalty and costs shall be fully paid, provided that no such imprisonment shall exceed six months for any one offense.

It is insisted by the petitioner first, that the above section of the statute is in violation of section twelve, of article two of the constitution of this State. Second, that the order of imprisonment should be made at the time of the rendition of the judgment, and should constitute a part of the judgment. In the case exparte Bolig, 31 Ill., 95, in discussing the Princeton ordinance, the court say, "Upon the hypothesis that the second section denounces punishment by imprisonment on a conviction for its breach, it is correctly said the police magistrate had no jurisdiction of the offense, for such magistrate is only a justice of the peace," citing the case of exparte Welsh, 17 Ill., 161."

"*Habeas corpus* is undoubtedly the proper remedy for very

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unlawful imprisonment, both in civil and criminal cases, but an imprisonment is not unlawful in the sense of this rule, merely because the process or order under which the party is held, has been irregularly issued or is erroneous. Process which has been irrgularly issued, may be set aside by the court or officer by whom it was issued, and erroneous judgments and orders may be reversed on appeal or writ of error, exparte McCullough, 35 California, 100. The writ of *habeas corpus* has not been given for the purpose of reviewing judgments or orders made by a court, or judge, or officer within their jurisdiction. To put it to such a use would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ, appellate jurisdiction over the orders and judgments of the highest judicial tribunal in the land—establish the doctrine that the judgments and orders of courts may be reviewed on habeas corpus upon the ground of error and appeals for the correction of errors, may be dispensed with in all cases in which the arrest or imprisonment of persons may be allowed. It is well settled that habeas corpus can be put to no such use, and that its functions where the party has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face, exparte McCullough, 35 Cal., 101, *People* v. *Cassels*, 5 Hill, 167, *People* v. *Sheriff of New York*, 7 Abbott, 96, *Exparte Gibson*, 31 Cal., 619, *Platt* v. *Harrison, Sheriff*, 6 Clark, (Iowa), 79. The jurisdiction of the magistrate to issue the writ in this case, is fully maintained in the case of exparte Bolig, 31 Ill., 96, the court in this case say, "To meet that large class of cases arising from the breaches of town ordinances and such like, where a fine is the only penalty, the offenders are not usually willing to wait until a fifa can be issued and returned. A summary mode of dealing with them is indispensable to the safety of society, and the preservation of good order, and it is no hardship upon them if they are unwilling to pay the fine, that the ordinary means should be used to compel them to pay. If the offender is unable to pay, he may get relief under an equitable construction of section 195, of the criminal code, or if he cannot thus, then by some action of the town council who would doubtless desire to relieve the town from the charge of his maintainance in

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prison after the expiration of a reasonable term of imprisonment. As we look at the case, the imprisonment is but an incident of the fine. This court has said a justice of the peace in fining a party for a contempt, may direct him to be imprisoned until the fine and costs are paid, *Brown* v. *The People*, 19 Ill., 613. The principle is inasmuch as the justice has power to fine, he has all the power necessary to make the granted power effectual by imprisoning the offender until the fine shall be paid. The imprisonment as in this case, is only a consequence of the power to fine." It is therefore clear that the section of the statute above cited, is in harmony with the constitution, and that the magistrate had power to lawfully issue the writ. It is not a case where the magistrate acted without having jurisdiction. The petitioner has a perfect, well defined and complete remedy in the regular and usual method of appeal. After conviction by a court or magistrate having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to the writ. The judgment and proceedings of another competent court cannot be revised upon *habeas corpus*. This we understand to be well settled, *Com* v. *Lacky*, 1 Watts, 68, case of Yates, 4 John, 317, 2 Kent, 26–33, *Storer* v. *State*, 4 Mo., 614, Riley's case, 2 Pick, 172, *Bk. U. S.* v. *Jenkins*, 18 John, 305, Exparte Watkins, 3 Peters, 193, *Johnson* v. *U. S.*, 3 McLean, 89, *Platt* v. *Harrison, Sheriff*, 6 Clark, (Iowa), 81, the magistrate having power to imprison on non-payment of the fine, the only question that remains is this: was it the duty of the magistrate to make the order of imprisonment a part of his judgment? Bishop in his work on criminal procedure, section 870, says, "where the sentence is to pay a fine, the order of the court should accompany the sentence, that the defendant stand committed until the fine or fine and costs, either or both, as the case may be, shall be paid. This is the common law doctrine and practice, and the same practice is confirmed also by statutory provisions in some of our States. There are perhaps cases which seem to imply that the sentence is not good unless it contains this provision to enforce its execution. But it was held in New York, on grave consideration, that if the sentence requires the defendant to pay a fine, and the judgment then proceeds to award process for its recovery according to the practice of the court, this is good, though there is no clause re-

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quiring the commitment of the defendant until the fine is paid," citing *Kane* v. *The People*, 8 Wend, 203.

This is simply a judgment for a fine, and the power to imprison is a necessary consequence of the power to fine. The judgement for the fine could have been rendered in the absence of the defendant, and order for his arrest issued at any time, conceding that it would be a better practice under the statute for the magistrate to order that the defendant stand committed until the fine and costs are paid. Yet to hold that the defendant would be entitled to his discharge because the magistrate did not so order, would be reviewing the judgment of the magistrate when the mode provided by law for such review is by appeal. The defendant alleges in his petition that he intends to appeal; by doing so, he can have a trial *denovo*; and on filing an appeal bond with the magistrate, and having the same approved, he will be entitled to be discharged. The writ is in all respects formal, and the magistrate having the lawful authority to commit the defendant, he must be remanded if the judgment is defective in form or, substance to an extent that will not warrant the commitment. The remedy is by petition for writ of habeas corpus and certiorari as was done in the case of exparte Lange, Legal News, vol. 6, page 237, where it is held that where a prisoner shows that he is held under a judgment of a federal court made without authority of law, the Supreme Court will by writs of habeas corpus and certiorari, look into the record so far as to ascertain whether the facts alleged be true, and if it is found to be so, will discharge the prisoner, exparte Lange, 18 Wallace, 163. The courts in this State have power to grant writs of habeas corpus and certiorari, and may award the same and look into the proceeding so far as to determine whether or not the proceedings will warrant the writ upon which the prisoner may be in custody. See exparte Lange, supra, and cases there cited.

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Northern District of Illinois—Circuit Court United States.

PEOPLE OF THE STATE OF ILLINOIS *v.* C. & A. RAILROAD CO.

The act of Congress of April 20th, 1871, does not authorize the transfer from a State to a United States court of a prosecution by the State against a railroad corporation for violation of its laws.

Opinion by

DRUMMOND, J. Delivered June, 1874 :—The State commenced a prosecution in its own name against the railroad company, a corporation of this State, for a violation of the act of May 2d, 1873, in the Circuit Court of Sangamon county. After the action was commenced, the defendant in vacation filed a petition, verified by affidavit, with the clerk of this court, which alleged in substance that the railroad company claimed the rights, privileges and immunities secured by the constitution of the United States, and that, under the color of the act of this State above mentioned, the company was subject to be deprived of the same, and asking for a writ of *certiorari* to the State court, where the action was pending. The clerk accordingly issued the writ of *certiorari*, requiring the State court to send to the court the records and proceedings in the cause. The question now made is whether the court has jurisdiction ofthe case. It is claimed to exist under the first section of the act of Congress of April 20th, 1871.

It is insisted by the counsel of the railroad company, that the language of this section includes all persons of every class within the jurisdiction of the United States; that it comprehends any right, privileges or immunities secured by the constitution, and any one of the amendments, and that the corporation is a person representing and acting for all the members of which it is composed, and for the rights, privileges and immunity secured to them as such. Now, if it be admitted that this is the true construction of the act of April 20th, 1871, and if it be considered, further, that the State was prosecuting an action of debt for a penalty which could not be imposed without causing the company to be subjected to the deprivation of rights, privileges and immunities granted by the constitution, the question is whether the same cause could be removed from the Circuit Court of Sangamon county, so as to authorize this court to take jurisdiction. The reason is that the act of the Legislature, under which the penalty is sought to be imposed, impaired the obligation of the contract which the State made with the company by its charter. If this were so, has Congress authorized the transfer of a case from the State to the Federal courts ? In such a contingency it must satisfactorily appear that this has been done.

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There can be no doubt that Congress can vest any jurisdiction authorized by the Constitution in the courts, either originally or by transfer from the State courts. But prior to the act of April 20th, 1871, that clause of the Constitution which prohibits a State from passing any law impairing the obligation of contracts, when involved in a suit pending in a State court, and the decision of the court was in favor of the validity of the law, could only be entertained by the Federal courts by writ of error under the 25th section of the judiciary act. Has the act of April 20th, 1871, changed this? If so, it must be by express words or by necessary implication. The first section of the act of 1871 declares that the person doing the injury under color of the State law shall be liable to an action at law in equity or other proper proceeding for redress. It will be observed that there the words "action at law" and "suit in equity" are omitted, and the language used in such proceeding to be prosecuted in the several District and Circuit Courts of the United States.

There can be no doubt that the action at law and suit in equity referred to are the original actions and suits to be commenced in the District and Circuit Courts, and it would seem not an unfair construction to hold that the proper proceeding should follow the principal words used, and that it also be referred to any other original proceeding than such as might be properly termed an action at law or suit in equity; and when they were prosecuted in the District or Circuit Court they were to be subject to the same right of appeal, review upon error, and other remedies in like cases provided under the act of April 9th, 1866, and other remedial laws in their nature applicable to such cases. Now the argument is because in some of the statutes here referred to provision is made under certain circumstances named in each case, for a transfer to the same from the State to the Federal court, that this cause can be transferred. We are not prepared to admit the conclusion. On the contrary, we think if the first section of the act of 1871 was interpreted to authorize the transfer, more explicit language would have been used. Undoubtedly that section in the case named intended to confer on the Circuit and District Courts original jurisdiction, but the full effect can be given to the section by applying the words "used to original actions at law, suits in equity, or other proper proceedings," and "like cases," may well mean cases originally brought in such courts, namely, the District and Circuit Courts of the United States. The case is not then within the rule already stated. The transfer of this case to this court is not anthorized by the expressed words or by necessary implication. We think, therefore, this court has no jurisdiction of the case, that the writ is quashed, and the suit remanded to the Sangamon Circuit Court.

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On page seventy, of the monthly WESTERN JURIST, we published the opinion of Judge Zane, of the Sangamon Circuit Court; we now publish the foregoing opinion of Judge Drummond, sustaining the opinion of Judge Zane.

The first section of the act of Congress, relied upon by the Counsel for the Railroad Company, provides, "That any person, who under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject or cause to be subjected any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities, secured by the Constitution of the United States. Shall any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress, such proceeding to be prosecuted in the several District or Circuit Courts of the United States, with and subject to the same rights of appeal, review upon error and other remedies, provided in like cases in such Courts, under the provisions of the act of the 9th of April, 1866, Entitled "An act to protect all persons in the United States in their civil rights, and furnish means of their vindication", and to the other remedial laws of the United States, which are in their nature applicable in such cases". For a full review of the authorities relied upon by the Counsel for the Railroad Company, the reader is referred to the able arguments filed in the case, and had we the space we should be glad to publish the argument of the Counsel in the case. The argument of the Counsel on both sides, and the opinions published, would add largely to the legal literature of the State and Nation. However, as the questions involved, must soon be decided by the Courts of last resort in the Statute and Nation, we await the dicisions of these trubunals for a final settlement of the controverted questions involved in the case.

District of Wisconsin—District Court United States.

BONDHOLDERS v. RAILROAD COMMISSIONERS ET. AL.

Upon an application for an injunction to restrain the railroad commissioners of Wisconsin, from executing the act of March 11th, 1874, known as the "Potter act," the court refused the injunction, because they were in doubt if the State had the power arbitrarily to fix certain rates for the transportation of persons and property in or out of the State.

Sur motion for a preliminary injunction.

Decision by

DRUMMOND, J. Delivered July 4th, 1874:—We have not had time to prepare any opinion in the case, but, as it was thought desirable that there should be a decision upon the motion for an injunction, I am instructed by the court to present the following as its conclusions upon the points made for a preliminary injunction:

1. On the assumption that the act of the 11th of March, 1874, "relating to railroads, express and telegraph companies in the State of Wisconsin," is invalid, we think the court has jurisdiction of the case. The bill is filed on behalf of citizens of Europe

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and of other States to enforce equitable rights, and to prevent action by the railroad commissioners which may result, as alleged, in serious injury to those rights. It was not necessary to wait until the commissioners had put the law in full operation, and its effects upon the railroad company had becomc complete before the application against them was made to a court of equity. A very important function of that court is to prevent threatened wrong to the rights of property.

2. We are of opinion that the act of the 11th of March, mentioned above, was not repealed by the act of the 12th of March, 1874, the second section of which declares "all existing corporations within this State shall have and possess all the powers and privileges contained . . . in their respective charters;" and the act of the 12th of March, 1874, the ninth section of which imposes a penalty for extortionate charges. There are apparent inconsistencies between these last two named acts and that of the 11th of March; but it becomes a question of intendment on the part of the Legislature. On the same day a joint resolution was passed (March 12th), directing the secretary of State not to publish the act of the 11th of March, until the 28th of April. In this State no general law is in force until after publication. We may consider the joint resolution in order to determine whether the Legislature intended that the two acts passed on the same day should repeal the act of the 11th of March, and from that it is manifest such was not the intention of the Legislature.

3. The charters of the railroad corporations under the constitution of Wisconsin "may be altered or repealed by the Legislature at any time after their passage." In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claim its rights of franchise and property in this State, the foregoing condition contained in the constitution. It became a part, by operation of law of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bondholders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the State.

4. This principle is not changed by authority from the Legislature of the State to a corporation to consolidate with a corporation of another State. The corporation of this State is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond the reach of its authority.

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5. As to the rates for the transit of persons and property exclusively within the limitations of this State, the Legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchise cannot touch the question of power in the Legislature. The repeal of its franchise would have well-nigh destroyed the value of its tangible property; and while the latter, as such, could not be taken, still, its essential value for use on the railroad would be gone.

6. The facts that grants of land were made by Congress to the State cannot change the rights of the corporations or of the creditors. If the State has not performed the trust it must answer to the United States.

7. The act of the 11th of March, 1874, while not interfering with the rates of freight on property transported entirely through the States to and from other States, includes within its terms property and persons transported on railroads from other States into Wisconsin, and from Wisconsin into other States. This act either establishes or authorizes the railroad commissioners to establish fixed rates of freight and fare on such persons and property. The case of "State Freight Tax" reported in 15th Wallace, p. 232, decides that this last described traffic constitutes "commerce between the several States," and that the regulation thereof belongs exclusively to Congress. It becomes, therefore, a very grave question whether it is competent for the State arbitrarily to fix certain rates for the transportation of persons and property of this inter-State commerce, as the right to lower rates implies also the right to raise them. There may be serious doubts whether this can be done. This point was not fully argued by the counsel, and scarcely at all by the counsel of the defendants; and, under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs it may be further considered at a future time either on demurrer to the bill or in such other form as may fairly present the question for our consideration.

In view of the decision just rendered, we trust it will not be considered out of the line of our duty to make a suggestion concerning this litigation to the counsel for the defense. It is manifest that the questions involved are grave ones, and that the court of last resort will ultimately have to pass upon them. It is equally manifest that a speedy decision, in which all parties are vitally interested, cannot be obtained unless there is harmony of action on the part of both the complainants and defendants. In the meantime, and while this litigation is in progress, would it not be better for the defendants, as far as lies in their power, to have prosecutions

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for penalties suspended? These prosecutions are not required to settle rights. They are attended with great expense, and if enforced while an effort is making in good faith, to test the validity of this legislation, must cause serious irritation, and cannot be, as it seems to us, productive of any good results.

Common Pleas of Luzerne County.

BEAUMONT v. GRAY'S EXECUTORS.

In cases of surprise, occasioned by the introduction of important testimony susceptible of contradiction, if opportunity be afforded, a continuance, if asked for may be granted; but after a party has submitted his evidence, and taken the chances of a verdict, he will not be allowed a new trial merely on the ground that he has since obtained other evidence cumulative to that given on the trial, and of which he did not then anticipate the importance.

Rule to show cause why new trial shall not be granted.

Opinion by DANA, J.

The plaintiff brought an action to recover for work done by himself and others under him, at the Silver Brook colliery, in taking out the water from the mines and saving the pumps, iron and other material exposed therein to loss and injury. He claimed that the work was done for Alexander Gray, and at his request, through his authorized agent, John Hosie.

The defendants denied that Mr. Gray employed or authorized the employment of the plaintiff, and averred that the mines were then in the possession and control of Hosie and Longstreet, for whom this work, if any, was done, and who alone were liable for its payment.

This was the issue between the parties.

The plaintiff called testimony to sustain his claim. Mr. Hosie was examined and testified to his agency for Mr. Gray in the employing of the plaintiff, the nature and urgency of the work, and the rate of compensation.

The defendants endeavored to contradict Mr. Hosie, the plaintiff's principal witness, by the production of his letters written to Mr. Gray at the time of the work, and by proof of his acts and declarations, and of negotiations between the witness and other parties, evincing his interest in and liability for the condition of the mines and for the machinery and property connected with them.

The jury having found for the plaintiff, the defendants obtained the present rule for a new trial, and now urge in its support that other testimony existed, to wit, the records of suits pending in Schuylkill county between Alex. Gray and Hosie & Longstreet, of which exemplifications are produced tending to contradict and further discredit Mr. Hosie's evidence.

It is a subject for regret that these records were not laid before the jury with the other testimony bearing upon the question of fact

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in the case. The defendants allege surprise by testimony wholly incorrect, and that they could not by any reasonable foresight have anticipated the necessity for the production of the records in order to contradict it. They gave evidence, however, upon trial to show it to be incorrect; the exemplifications now offered are to the same effect, are simply cumulative, and, under the established rules, do not authorize the granting of a new trial. In cases of surprise, occasioned by the introduction of important testimony susceptible of contradiction if opportunity be offorded, the court may grant a continuance of the cause if it be asked for; but after a party has submitted his evidence, and taken the chances of a verdict, a new trial will not be granted to allow the introduction of evidence merely cumulative to that produced on the former trial.

The further objection was taken to the verdict that the plaintiffs counsel misstated the evidence relative to the advantages derived by Mr. Gray's estate from the plaintiff's labor and services. This question was raised at the time the statement complained of was made.

There was evidence, if believed, in the testimony of John Hosie on which, with the latitude necessarily allowed to counsel in arguing question of fact, the inference or statement complained of was so far warranted as to save it at least from the character of a misstatement of the evidence. The rule is discharged.

E. S. Osborne, Esq., for plaintiff; A. Ricketts, Esq., for defendants.

The exact question decided in the above case, that the proper practice is to apply for a continuance, in cases of surprise by the introduction of important testimony susceptible of contradiction, in case the party should obtain a continuance or delay of the trial of the cause, has not been decided in this State. The object of Courts should be to administer justice, and the rules of law should be such, that Courts may be able to administer justice, without the violation of any established rule of law. It being the policy of the law, that every suit shall have a fair trial, and there can be no doubt, that cases do arise where a party is taken by surprise, in such case would not seem to be the proper practice to allow the case to go to verdict, and then enter a motion for new trial on the ground, that he was surprised by evidence given on the trial. This question was presented, but not decided in the case of *Holbrook* v. *Nicholas & Prettyman*, 36 Ill., 168. In that case the appellant made an application for a continuance, which was overruled. The Court say, "We deem it unnecessary to inquire, whether the court erred in refusing to continue the case in the middle of the trial, but shall proceed to examine the question, whether the Court erred in refusing to grant a new trial". In this case the motion for new trial was based on the affidavit, filed for continuance now conceding, that under our practice as affirmed in this case, that the party may be entitled to a new trial, and see also *Chicago & Great Eastern Railway Co.* v. *Vosbugh*, 45 Ill., 317, and *Thompson* v. *Anthony*, 48 Ill., 486. Yet, it would seem to be the better practice to apply at the time for a continuance, especially if the proposed evidence is cumulative, and the Court passing upon the question if overruled, as in the case in the 36 Ill. *supra*, the party might have the benefit of the motion to continue upon the motion for new trial, and it would seem to be the better rule to adopt the rule as announced in the principal case. An examination of the above cases will show, that the chances of a new trial on the ground of surprise are not flattering. Hence, the necessity of a well settled rule of practice.

ERATTA.—On page 148, in first line of last paragraph, should read Georgia 338 instead of Law 338.

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THE

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ANTENUPTIAL INCONTINENCE AND VENEREAL DISEASE.

IS IT GROUNDS FOR DIVORCE.

The writers attention was first called to this subject during the late war. He was visiting in a semi-official capacity the various general hospitals of Baltimore and Washington, having access to all the departments, and an extended acquaintance with the officials in charge. Some scenes there witnessed set him to investigating the origin and consequences of venereal diseases. He has read numerous works on the subject, and among them, Hammond on Venereal Diseases, Acton on Prostitution, Durkee on Syphilis, and Ricord and Bumpsted; besides various essays, and other works, including our own Cowan. We do not propose to follow the pathology of this horrid disease, or dwell upon the terrible havoc it makes upon the human system, or paint the misery and lingering death. This is the work of our medical authors. But we will say here, that the student will be astonished to find the soil of the departments of law, almost totally barren of the question. And now to open our question fairly, we will say that all the writers on syphilitic diseases agree.

1. That it is the most horrid, dangerous and disgusting disease known to mankind.

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2. That cohabitation with it is not only loathsome, but dangerous in the extreme.

3. That its virus may pass from one to another, even by touch or by handling the same article.

4. That in a tertiary or chronic stage, it is incurable.

5. That offspring born of syphilitic parents, inherit this terrible evil.

6. And that, even when there may be a supposed cure in the parent.

It would be useless to undertake to quote. Solomon pictures them as those whose steps take hold on hell. Dr. Muhlenburg, in his "Midnight Missive," says: "The most loathsome sight, which the diseased human body, in man or woman exhibits. The most horridly disgusting, *are the living corpses, in which victims of lusts are putrifying to their graves.*"

Again it is termed, "That most hideous disease, that must have come from the most venomous tooth of the serpent, when it bit mankind." *5th Annual Report State Board of Charities, Mass.*, 1868.

In our larger cities it festers like a blighting canker—carrying the most poignant grief to hundreds of families, not brought to light, because of self mortification. And as one eminent writer lately said: "Could we tear the veil from off two-thirds of our suicides, we would find 'veneria' the cause." One cursed with the disease, being like the leper in the camp of Israel, unfit to live alone, and dangerous to every body else.

In discussing the question then, we will briefly examine the *status* of marriage. 2d. Its object, aims and purposes, as viewed from the best authors legally. 3d. The qualifications of marriage. The relations to the State, &c. Then keeping in view, a marriage where one of the parties was at the time, foul with venereal disease, apply the definitions as we go along. And we make no fancy sketch; for the writer has had several such cases in his practice; one in particular, where the husband refused to copulate, and upon examination the wife found to her horror and disgust, that his genital organs were quite destroyed by syphilitic disease, and this case was one from the higher walks of life. In another, a most revolting case, where a woman mar-

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ried a most estimable gentleman, when at the time, according to the evidence, she was loathsome with tertiary syphilis.

We come then to the main question. Is antenuptial incontinence, and venereal disease, unknown to the opposite party at the time of marriage, grounds for divorce? Almost naturally the answer seems to be, yes. But upon examination, the student will find there is almost an utter barrenness in our legal works, upon this subject. We must be guided then more by reason and analogy, than by authorities. And first the status. Most of our law writers have defined marriage to be merely a civil contract. *Bouvier's Institutes, Vol. I*, 101. But it must be mutual, reciprocal, and conformable to the laws of the State. (Same.) *Parsons on Contracts, II*, 114. *Chitty on Contracts*, 468.

But all the old definitions are beautifully blended and enlarged, by Chief Justice Story, in "The Conflict of Laws," where he shows how a marriage contract differs from an ordinary contract, and holds that, "Contracts are the children of society, marriage the parent." *Story's Conflict of Laws*, 110 and 108. Lord Robb said: "Marriage is a contract, *sui generis*, differing in many respects from all other contracts. The STATUS is *juris gentium*. Its foundation rests like other contracts, in consent; but its rights, duties, and obligations, are matters of municipal regulation. *Furguson on Marriage and Divorce*, 397.

But the modern definition is much better.

"Marriage is the *civil status* of one man and one woman, united in law for life, under obligation, to *discharge to each other and to community*, those duties, which community holds incumbent on them. It proceeds from the civil contract, between one man and one woman of the *needful civil and physical capacity*." *Bishop, Marriage and Divorce, I*, § 3.

It is a contract until the marriage, then it is merged into a higher nature, the Status. *Bishop, I*, § 3, *II*, § 193.

We have called attention to these definitions, so that we may start in the argument with high and correct views of the marriage status; and from this standard, measure the law upon any given case.

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Second. Its objects, aims and purposes, viewed from a legal stand point.

Marriage has a manifold relation to be considered.

1st. Those of the parties to each other. 2d. To the offspring. 3d. To society. 4th. To the State, and 5th. To the moral law. *Story's Crim. Law*, 108.

Now each of these must be preserved in tact, or some ingredient of the marriage status is wanting. The law when applied, looks down the vista of the future, and contemplates the results; and it demands the assemblage in a marriage of all the essential elements. An idiot, or one demented cannot consent. An incestuous marriage is void. They are wrongs to the parties; an evil in the moral world; a corruption of society and its elements.

Again: The end of marriage is the procreation and perpetuation of the human race. All must be subservient to this. The state has the right to and must govern these relations, for every one is born into the state without his consent, to become a part of the great civil body. Hence the relation of state to the *status* of those who thrust offspring upon its mercies and claim its protection.

The marriage relation underlies, and is the base of the very existence of the state. The state then, by its laws, has the inherent right to demand purity and integrity in the marriage; to the end that her citizens should not spread foul and contaminating diseases, or thrust upon it, offspring to be shunned as a leper. The state should be the guardian of its own interests. Hence we argue that *the state should furnish the power to separate* a man and woman, should either desire it, when that union is liable to generate or spread syphilitic disease.

Again: "The tide of humanity is constantly departing. Procreation must sustain the stream. The state has the right to dictate, that the insane, diseased and helpless, may not be her burden instead of her power and support. The state should guard against unions, that endanger her interests, and she does, by various laws. The interests of the family and the state are reciprocal." *Morse Lectures.*

The common law recognizes, unimpaired pro-creative abili-

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ty. There must be power to bring forth offspring. What kind? The state demands healthy offspring, as near as possible. The want of procreative power renders the marriage voidable.

"That a marriage may be good, the parties must be marriageable." *Webster.*

"They should be in a condition to copulate, and in a condition to pro-create." *Bishop.*

Will any one contend that a man or woman diseased with "veneria" is marriageable, fit to be married. Can such a union be prolific of happiness, sexual pleasure, the procreation of the race, an honor to society and a part of the state? If not, then the aims and objects of marriage are frustrated. What then?

"Every person, *mentally* and *physically* competent, and who will perform the duties required of the marital relation has the right to marry. And when a party so far fails as to frustrate its ends, this being established, the government should find means to free the innocent party." *Bishop on Marriage and Divorce*, § 33.

"The interests of the state concur with private right in dissolving a marriage failing to meet the ends germain to its relation."—*Same*, § 34.

It should be dissolved when by the conduct of one party, connection is *intolerable* and *inconsistent.*

In Swift's Systems, 191, et. seq., it is laid down, that, "when marriage instead of being a source of the highest pleasure, is a source of woe and misery, there should be a dissolution; and when cohabitation is impracticable, there should be divorce."

"Corporal infirmities which inspire *disgust* and *repugnance*, should give the other the right of divorce." *Bishop on Mar. & Div.*, 697.

We take it that a bill for divorce in this case may charge both impotency and fraud, and may be, cruelty.

AND FIRST IMPOTENCY.

"Marriage, if one be destitute of the sexual organs, or so deficient as to be unable to perform their proper functions, can have no validity." *Bishop*, 321.

"Sexual intercourse the end, and the sexual organs must be

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healthy and complete essentially." *Lord Penzance in English Divorce.*

"This should give offspring and avoid fornication. *Ayliff Laws.*

"There should be lawful and safe indulgence." *Dr. Lushington.*

And if there is inability to copulate, there is an end to the design. It is frustrated. Has a man or woman, rotten with syphilis, ability to copulate? as contemplated by law.

AS FRAUDULENT.

In the contract, there is an implied warranty, that the parties are marriageable, i. e. fit to marry, capable of consummating it with safety; affording sexual pleasure, connubial happiness, and power to produce offspring. *Poynter on Mar. & Divorce. Shelford on Marriage*, 201. *Rutherford's Inst.*

Impotency is defined, inability to copulate. 2d. *Languishing under disease.* See *Frazier's Domestic Relations.*

And copulation, or sexual intercourse is defined: perfect, ordinary intercourse. 1*st Robb*, 279.

"Parties should not be driven to *disgusting practices.*"—*Dr. Lushington.*

What could be more imperfect or disgusting than to bed with a person who had venereal disease, to say nothing of copulation; but stronger than this, the same case says, "when the *coitus* is unnatural, disgust is generated." No man ought to be held to such unnatural connection; the marriage should be held void.

The statutes of most of the States, grant divorce for specific causes, and then give a general clause, like the statute of Illinois. *Ill. Divorce Law*, § 8.

But the courts hold, that this includes only cases known to the common law. *Hamaker* v. *Hamaker*, 15 Ill. 137.

And our common law books give only cases where venerial disease is contracted after marriage, and then, not for that so much, for the contracting it, is *prima facie* proof of adultery; and the divorce takes ground in, and is granted for the adultery.

We do find cases of divorce where the woman was endowed with wealth, beauty, talents, symmetry of form, voluptuousness,

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highly connected, healthy, and all that pride or taste could require; but there was lack, either of coative or procreative ability; yet how much superior would this be to a woman bringing to her bridal couch the remains of the debauchee, which, if she did not inoculate, or endanger the life of her husband, might entail wretchedness on her offspring. He or she marries, pretending to have virgin purity, instead the living body is joined to a putrid and dying carcass.

Again: We find that some of the French courts have classed this question under the head of cruelty. Let us examine it under our definitions. Cruelty: any conduct that furnishes a reasonable apprehension, *that the continuance of cohabitation would be attended with bodily harm. Bishop*, §717.

Apply this to the given case, would not any sensitive man or woman fly from one he or she finds so diseased, with ten times more fear, than from one in a sallie of passion, giving blows?

Another says, legal cruelty is that which *may endanger life or health. Lord Stowel, Evans* v. *Evans*, 1 Hay. 35.

"It is that which, to discharge the duties imposed by marriage, would endanger the *safety* or *physical health* of the other." *Bishop*, § 717.

"It is that which makes life intolerable and burdensome; and this does not always mean blows and batteries. It may have various shades." *Elms* v. *Elms*, 9 Bar. 196.

Applying then these definitions, we think it plain that a person with syphilis, is incompetent and impotent to copulate; and in such case if copulation were insisted on, it would be legal cruelty.

NOW OF FRAUD GENERALLY.

Fraud in marriage, has been adjudicated upon in a thousand various phases; but we must reason by analogy to apply it to our case. To define fraud is impossible, it must depend always upon the particular case. "It cannot be applied to the marriage contract as to others, for this would reduce the main pillar of society to the level of common bargains." *Supreme Court, Conn.*

In general, contracts are dissolved for fraud, where a party

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withholds or *conceals* something vital and essential to the contract. How would it be here. A contract is entered into surrounded by every thing hallowed and sacred. There is the implied warranty of fitness; but a vital and material fact is concealed, one which if announced, the other would shrink from the contract with terror. Then if the innocent has been duped with regard to the *ensentialia* of the relation, it should be dissolved for the fraud.

Antenuptial incontinence alone, is not ground for divorce. This is known as the Ayliff Law, which says: "If a woman previously defiled pretends to be a virgin, and a man marry her in this faith it is good." *Frazier's Dom. Rel.*

Yet this law Bishop says, stands on a weak foundation, and when we go back to the history of its time, the reason for it strikes us with holy horror. A strong reason against it is, that chastity or unchastity, cannot be investigated prior to marriage, while all other personal qualities may be, hence the chance to deception. Still the rule obtains, and because, otherwise a person having been led away by strong passion could have no hope of reform. *3d Dev.* 355. And further, the law implies virtue from marriage, and charity throws around them the mantle of fig leaves to hide past transgressions. Says Lord Penzance, "by marriage, no matter what her past life, she bound herself to eternal chastity." In all these cases the charge was only, that there had been antenuptial incontinence.

One answer set up is, that by the marriage vow, the parties take for better or worse. But this has reference only to such matters, that upon reasonable inquiry, may be found out; and from these there is no relief. But this has no reference to chastity. *Bishop*, § 169. An inquiry would imply doubt, and doubt would beget a breach by the other with reasonable grounds.

Again: The rule in regard to antenuptial incontinence, cannot obtain where there is venereal disease connected. While there is a large margin of choice between a virgin and a prostitute, yet if the incontinent be not diseased, the law says, no matter what the past, you are presumed to be physically able and competent to afford your partner sexual pleasure and indulgence, to pro-create the race, and this without fear of any horrid

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disease. Yea, you may become the model partner or parent, and an ornament to society.

Further: Under fraud we have cases where, by reason of the womb being incapacitated from performing the functions necessary to marriage, divorce is granted. Such is *Reynolds* v. *Reynolds*, 3d Allen, 605. Judge Bigelow, held that, "inasmuch as she was pregnant at the time by some other than the husband, she was unfitted, had incapacitated herself from executing a valid contract of marriage."

Is the incapacity as great as it would have been, had the same woman instead of a child, had the poison virus of lechery there, not only eating away her life, but ready to innoculate the innocent?

As to the marriage, there are three parties: the man, the woman, and society. So to the divorce there are the same three. The court sitting to protect society. The court should see that it is reasonable and proper. *Conducive* to the interests of society, to domestic harmony, and the good of the parties.

Looking at a marriage then of the character in question, from the standpoint and measurment of what a marriage should be, its objects, aims and purposes, what is implied; then taking into consideration, the loathsome facts in regard to the disease, and what it may entail; then consider the relation of the parties if left together; what that relation implies and expects; the relation of the facts to the offspring, of the offspring to the state, and the whole to society. Think that connection is intolerable and inconsistent. That instead of the highest pleasure, it is the source of woe and misery; that it inspires disgust and loathing; that copulation or even cohabitation in its lightest sense is dangerous, and looking at the great fraud perpetrated upon the other and upon society, shall the *twain* longer be one flesh?

Said the Court of Lyons, 1816: "It is an outrage the most grievous for morals, the most frightful for the family, since it comes to pass that a man, knowingly inflicted with the disgraceful poison of the brothel, has the infamy to defile the nuptial couch the very day he is admitted to it; that a man with full knowledge has planted the germ of this shameful disease into

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the bosom of the unfortunate, of whom he has deceived the faith, who has destroyed from the first of her conjugal life, her physical and moral existence, who has borne to a family shame and despair."

And in another French case, says counsel: "What! for a provision that perhaps repentance has followed, a woman may escape the empire of her husband, yet she cannot break from an outrage that causes poison to circulate through her veins, which remedies the most vaunted cannot destroy."

Common ills, the natural diseases, Providence sends alike to virtue and vice. But syphilis is the fruit and punishment of the brothel, a contagion concealed under the veil of affection. Shall man and woman be decreed to live together when one is thus defiled? W. F. T.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. MOREAU D. SMITH v. NORMAN BROWN, CONSTABLE, ETC.

AT CHAMBERS.

1. The 7th section of the County Court act, Gross Statute, vol. 3, page 109, considered and construed.

2. The practice in criminal cases, so far as the same may be carried on by information reviewed.

3. The 117th section of the act entitled County Courts held unconstitutional, so far as the same authorizes criminal warrants to issue without proof of probable cause.

4. The constitutional provision that requires, "All laws relating to courts to be general and of uniform operation, and the jurisdiction, powers and proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts severally, shall be uniform," considered. Held, that so far as the act authorizes prosecutions by information, is unconsititutional and void.

Opinion by MCALLISTE, J.—This is a proceeding upon habeas corpus, to inquire into the legality of a certain criminal warrant, upon which the petitioner claims he is illegally imprisoned by respondent.

It appears by the return and agreement of counsel as to facts, that, Aug. 21, 1874, during vacation of the County Court of Lake county, the State's attorney *ex officio*, filed in said court,

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without any proof of probable cause, an information against petitioner, charging that, on Aug. 16, 1874, he, the relator, at Waukegan, unlawfully did sell one gill of intoxicating liquor, without having any license to keep a dram shop. Whereupon the county judge, without any evidence, fixed the amount of bail to be required of relator, and the clerk, under his hand and the seal of the court, without evidence of probable cause, issued a criminal warrant or capias for the arrest of relator on said charge, returnable to the next term of said court, on the second Monday of January next, and indorsed thereon the amount of bail so fixed. This writ, so issued, was on the same day delivered to respondent, a constable of said county, for execution, who, on the same day, arrested relator thereon, and the latter made application for a writ of habeas corpus, which was awarded and return made thereto by respondent, setting up said writ as the cause of the capture and detention of relator. This return, with the stipulated facts, bring before me for decision the question of the legality of that writ, issued without any proof of probable cause.

The State's attorney insists that the writ in manner and form was authorized by sections 117 and 118 of an act of the general assembly approved March 25, 1874, to extend the jurisdiction of the courts and to provide for the practice thereof.

After looking at those sections, I found that the 117th section expressly authorized the respective State's attorneys of the several counties of this State, or the attorney general, to prosecute for any offense cognizable in the County Courts, by information to be filed *ex officio* without any proof of probable cause, and expressly declares that such information may be filed in said courts in vacation as well as in term time; but when presented by any other person than the State's attorney or attorney general, there must be verification by affidavit. I found also that the 118th section authorizes a criminal process to be issued, and requires the judge of the County Court to fix the amount of bail before issuing it, when the information is filed in vacation, which amount must be indorsed by the clerk in process.

The counsel for the petitioner insisted, however, that the provisions of the statute were in contravention of the constitu-

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tion of this State, and therefore the writ, although issued in conformity with the statute, was void, by section 5, art. 2, of the constitution, and he cited the observations of the courts in the case of *Myers* v. *The People*, decided at the January term, 1873, reported 5 *Legal News*, 255. The questions there presented arose under the former act, extending the jurisdiction of County Courts, which also provided for prosecutions by information. The court said: "We are of the opinion that the 5th section of the County Court act should be construed with reference to the 6th section of the bill of rights, which declares that no warrants shall issue without probable cause, supported by affidavit, etc. If informations could be filed upon which a warrant for arrest may issue, without affidavit, the door would be open to intolerable abuses. Every man's liberty would be at the mercy of the caprice or malice of the State or County attorney. This expression was not necessary to the decision of any point in the case further than this: There were affidavits, but it was claimed they did not show probable cause. If none at all were necessary, that would be an answer to that objection. However, if the remarks could be regarded as *obiter dicta*, they were not the *dicta* merely of the judge who delivered the opinion. He was directed to make them, by a majority of the court. That section of the County Court act did not expressly or impliedly authorize the State's attorney to file the information *ex officio* without proof. But by the 117th section of the present act, he is so authorized. The question is one of so much, of so vital importance to the civil liberties of the citizen, that I have felt it my duty to look farther into the question and see if the courts took an erroneous view of it, in what was said in *Myers* v. *The People*.

The mode of prosecution prescribed by the 117th section of the present County Court act, is peculiar to county courts. By section 2 of division 10, of the statute entitled Criminal Jurisprudences, approved March 27, 1874, it is declared that all offenses cognizable in the Circuit Courts of the State and Criminal Court of Cook county, shall be prosecuted by indictment. [Myers' Statutes of 1874, p. 145.]

The first section of the act in relation to courts of record in

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cities, approved March 26, 1874. (See Myers' Stat., p. 43), provides that such courts "shall have concurrent jurisdiction with the Circuit Courts within the city in which the same may be in all civil cases, and in all criminal cases except treason and murder, and the course of proceedings and practice in such courts shall be the same as in the Circuit Courts, so far as may be."

The seventh section of the County Court act (see Myers' Stat., p. 37) declares that the County Courts shall have concurrent jurisdiction with the Circuit Courts, in all criminal offenses and misdemeanors when the punishment is not imprisonment in the penitentiary, or death. Then the 117th section, same act (Myers' Stat., 41) says, "All offenses in County Courts shall be prosecuted by information of the State's attorney, or some other person, and when an information is presented by any person other than the state's attorney or attorney general, it shall be verified by affidavit of such person that the same is true, and that the same is true as he is informed and believes," etc.

The question of the legality of the process in this case must be considered in two aspects: one, whether under our constitution, it could lawfully issue upon the mere precipe of the State's attorney, without proof of probable cause. The other, whether under the provisions of the 19th section of article 6, it was competent for the legislature as to proceedings in the County Court, under a jurisdiction concurrent with the Circuit Court, to introduce a practice peculiar to County Courts alone, and utterly different from that prescribed for the Circuit Courts and courts of record in cities.

This practice, peculiar to County Courts, does not seem to have been a novel one, devised by the legislature. It is borrowed and substantially copied from an odious feature of the English laws, engrafted upon those laws and tolerated through favor to the prerogatives of the crown, and against the better feelings of England's old-time lawyers and judges of broad and humane views. Sir Matthew Hale was no friend to this mode of prosecution. [See Black. Com., Book 4, chap. 23, p. 311.]

"The informations," says that author, "that are exhibited in the name of the king alone, are of two kinds; first, those which are truly and properly his own suits, and filed *ex officio*

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by his own immediate officer, the attorney general; secondly, those in which the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the king's bench, usually called the master of the crown office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such *enormous misdemeanors* as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses *so high and dangerous*, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal." [Black. Com., Book 4, chap. 23, p. 308.]

It will be seen by consulting that and other authors, the English law, unaffected by the vicious principles introduced by the Tudors, sanctioned a prosecution by information, filed *ex officio* by the attorney general, only in *great emergencies*, and *then* always in that high and respectable jurisdiction the king's bench. The reason by which this procedure was supported, does not, and cannot apply in this country. And, therefore, until the grand jury system is abolished, it cannot be regarded *as due process of law*. But the statute of 3 Henry VII, c. 1, extended the jurisdiction of the Court of Star Chamber, and prosecutions by information there became the general practice. "Then it was," says Blackstone, "that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII), by hunting out obsolete penalties *and this tyranical mode of prosecution*, with other oppressive devices, continually harassed the subject and shamefully enriched the crown."

After this Star Chamber Court, which by that mode of prosecution had so long been used as an engine of oppression, had been dissolved and the old common law authority of the king's bench, restored, a struggle was made to have that court declare this mode of prosecution illegal, on account of the oppressive use which had been made of it. And this system, which

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has exemplified its capacity to subserve the purposes of the wicked and oppressive, and thus become historically obnoxious, we, near the last quarter of the nineteenth century, have adopted and put into the hands of our inferior courts.

"It is true," says Blackstone, "Sir Matthew Hale, who presided in this court soon after such revival, is said to have been no friend to this mode of prosecution; and if so, the reason of such, his dislike, was probably the ill use which the master of the crown office then made of his authority, by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor, rather than his doubt of their legality or propriety upon *urgent occasions*."

With the adoption of the sumptuary laws, and the formation of political organizations in reference to them, the road to abuse under this system is a very plain one. But, if the act of the legislature is not in violation of the constitution, the courts have no concern in anything but its enforcement.

The bill of rights, forming a part of our fundamental law, embraces a number of declarations of principle calculated to protect the people in the full enjoyment of civil liberty, as against the acts of the government. These principles are mostly embodied in, and are borrowed from the English *Magna Charta*. But many of them are framed to meet cases where the functionaries of government in that country asserted powers which those advanced in the true principles of government in that country disputed and combated, but for considerable periods of time were overriden. As an instance of that kind, was that of Lord Halifax, as Secretary of State, issuing his warrants, directed to four messengers, to apprehend and seize the printers and publishers of a paper called *The North Briton*, No. 45, without any proof laid before him previous to granting such writ, and without naming any person whatsoever in the warrant. Under this rambling process, houses were searched and papers seized. Dryden Leach, a printer, Huckle, his journeyman, the famous Wilkes, and fifteen others, were arrested, and trespass brought for the injury on the ground of the illegality of the warrant, and the parties recovered. The cases of Wilkes and Huckle in the Common Pleas, are severally reported in 2 Wilson's Report, 204, 205, and

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were decided A. D. 1763. The case of Dryden Leach was decided in king's bench A. D. 1765, and reported in 3 Burrow's Report, p. 1742.

The point that to enter a man's house upon a general warrant was against the Magna Charta, was expressly ruled in Huckle's case, the Lord Chief Justice using this strong language: "To enter a man's house, by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of a subject." In Dryden Leach's case, the point, amongst others, was expressly made, by Mr. Dunning of counsel for Leach, that the warrant was also void, for the reason that there was no evidence of guilt produced to the secretary before issuing it. The case, however, went off on another point, and that one was not decided. It is evident that that ground entered seriously into the controversy. Mr. May, in his constitutional history of England, says: "Among the remnants of a jurisprudence which had favored prerogative at the expense of liberty, was that of the arrest of persons under general warrants, *without previous evidence of their guilt*, or identification of their persons." [Cooley's Const. Lim. 300, note 1.]

The discussion and decision of these cases arising out of the issuance of the general warrant by Lord Halifax, and the arrests made thereunder, occurred while the momentous questions involved in the American revolution were undergoing the severest scrutiny by some of the finest and most capacious legal minds that have ever adorned and blessed any country, and among those questions were those of the rights of civil liberty, which were analyzed to the very root. These great men were doubtless familiar with every phase of that recent contest in the mother country, and it was with a view to all the principles involved, that the fourth section of the amendments of the constitution of the United States was framed. That section declares: "The right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, *but upon probable cause, supported by oath or affirmation*, and particularly describ-

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ing the place to be searched, and the *person* or things to be seized."

This is engrafted upon the constitution of this State in the same language, except it says, that "no warrant shall issue without probable cause, supported by *affidavit*," etc.

The State's attorney argues that this provision of the bill of rights has reference only to search-warrants. We have already shown what antecedent events led to its adoption. No person, it would seem, could read attentively the history of those events and then contemplate the terms of the bill of rights on that head, in our federal constitution, without perceiving an intention to cover the whole ground. It would not secure the required protection against unreasonable searches and seizures, to merely require the place to be searched and the personal things to be seized, to be described in the warrant, if such warrants could be enforced without any proof showing probable cause.

Now let us put this matter to a practical test, so that any legal mind can readily apprehend it. Suppose the legislature should pass an act, which, in direct language provided that in all cases of the publication of a libel wherein no search of houses or seizure of papers was sought, it should be lawful for any magistrate authorized to issue criminal warrants, to issue a general warrant against the authors, publishers, or printers of such libel, without naming the persons to be arrested, and that the officer might arrest such author, publisher, or printer thereon when found, in pursuance of such warrant. Would any sound lawyer say that such an act was constitutional? Certainly not. And why? Because that would be to revive general warrants, and they are forbidden by section 6, of article 2 of our constitution. But is that the only thing forbidden by that section? Does it not expressly declare: "and no warrant shall issue, *without probable cause, supported by affidavit*, particularly describing the place to be searched, and the *persons*, or things to be seized?" Probable cause, supported by affidavit, is just as indispensable as the description of the person or things to be seized. It would require considerable hardihood for any lawyer, or statesman, to maintain that either Congress or our Legislature could, in the face of that provision of the constitution, pass any act making

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it lawful for magistrates to issue general warrants like that issued by Lord Halifax, in all cases of alleged offenses, when it was not sought to search houses, or seize papers or effects. If such warrants could not be authorized, then, for the same reason, none can, be authorized, without affidavit or its equivalent, the presentment of a grand jury showing probable cause.

The constitution, in this particular, is designed as a bulwark against a particular procedure, fraught with the power of oppression. It is broad enough to accomplish the purpose, and it matters not what the process is called, whether a capias or a warrant, the substance of the thing is, that it shall not be allowable for any one man to order a criminal process at his discretion, against a citizen without probable cause, established by legal proof. This brings us to the second ground of inquiry, as to the constitutionality of this procedure by information.

By section 18, article 6, of the constitution, the County Courts, besides the original jurisdiction there given, may have such other jurisdiction as may be provided by general law. So also of the several courts of record in cities, provided it be limited territorially to the city where the court is.

Then there is the Criminal Court of Cook county, which has concurrent jurisdiction with the several Circuit Courts in all criminal cases, but has no jurisdiction in civil cases between citizen and citizen. Here are three classes of courts, none of which have full concurrent jurisdiction with the Circuit Courts, while they all have concurrent jurisdiction to a certain extent, varying somewhat in the limit. The 29th section of article 6, reads thus: "All laws relating to courts shall be general, and of uniform operation; and the jurisdiction, powers, *proceedings* and *practice* of all courts of the same class *or grade* so far *as regulated by law* and the force and effect of the process, judgments and decrees of such courts, severally, *shall be uniform.*"

The circumstances which led to the adoption of that provision, are familiar to every lawyer. It was a diversity of practice in the different jurisdictions of the State. Courts may not be of the same class, and yet, when jurisdiction is conferred by law, then, so far as regulated by law, it seems to me that to the extent their jurisdictions are made concurrent, they are of the same

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grade and their procedure must be uniform. Would the circumstance that the Criminal Court of Cook county had no civil jurisdiction, so far diversify its grade from that of the Circuit Courts as to admit of a separate system of procedure for such Criminal Court? And, again: Would the circumstance that the courts of record in cities have not a concurrent jurisdiction with the Circuit Courts, in cases of treason and murder, warrants the position that, for such city courts, the legislature could prescribe a code, like that of Wisconsin or New York, when the common law practice obtained in the Circuit Courts? Every good lawyer would give a negative answer to such a proposition. Then, upon what process of reasoning can it be shown that, while the old, regular common law system of criminal procedure is in force as to the Circuit Courts, it is competent for the legislature to provide a procedure in the County Courts alone, for the very criminal cases of which such courts have concurrent jurisdiction with the Circuit Courts, and such procedure entirely variant from that of the Circuit Courts? If this can be done, then I confess, constitutions are of little use. The intention was to effectually cut up by the roots this thing of different systems of practice in different jurisdictions. It is my opinion the County Courts act, in so far as it authorizes criminal warrants to issue upon a charge unsupported by proof of probable cause, and in so far as it provides for a procedure entirely different from that in the Circuit Courts, is unconstitutional. It follows the prisoner must be discharged.

Mr. D. Brewer, counsel for relator.

Mr. Joseph L. Williams, State's attorney for the people.

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Supreme Court of Pennsylvania.

JOSEPH BROWN v. THE COMMONWEALTH OF PENNSYLVANIA.

1. The court below refused to permit the grand jurors to be polled on their *voir dire* before the submission of the bill of indictment. *Held*, not to be error.

2. Under an order for a *tales de circumstantibus* the sheriff may summon the talesmen from either the bystanders or the body of the county, or both. The 41st sec. of the Crim. Procedure act of March 31, 1860, construed.

3. When two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, the death of the one and surrounding circumstances may be given in evidenee upon the trial of the prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same which led to the murder of both at the same time. *Shaffner* v. *Com'th*, distinguished.

4. On a question of the admissibility of the confession of a prisoner, which had in the first instance been admitted by the court, it is not error to submit it to the jury on the evidence to say whether any improper influence was used, and, in charging, if there was any, that they should disregard the confession.

Error to the Criminal Court of Schuylkill county.

Opinion delivered July 2, 1874, by

AGNEW, C. J.—On the night of the 25th of February, 1872, Daniel M. Kraemer, a farmer of reputed wealth, aged about sixty years, and his wife were murdered on his farm in Washington township, Schuylkill county. She was found on the next morning lying across her bed insensible and partially undressed, but afterwards became conscious and able to state some of the circumstances of that night, and died on the 4th of March, following. Her son, living away from home, who first found her, ran to give the alarm, and on his way discovered the dead body of his father lying at a distance from the house of about three hundred yards. Near him was found a heavy oak club covered with blood and hair. The wounds on the head of both husband and wife were such as this weapon would probably make, and were of a fatal character. The chest, bureau and desk in the house had been broken open, and evidence that the perpetrator of the murders had been in pursuit of plunder. The only inmate of the house, beside Mr. and Mrs. Kraemer, was her mother, a lady so old, deaf, blind and helpless, that she could furnish

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no information. All the circumstances evidenced that the murders and the search for money, were contemporaneous and part of the transaction.

The prisoner has been twice tried and convicted. The first conviction for the murder of Daniel Kraemer was reversed for errors more technical than substantial. The second conviction was for the murder of Mrs. Annetta Kraemer, and this is the record before us. Under these circumstances, before reversing a second time, a court should feel satisfied a substantial error has been committed. Of the forty-six assignments of error, only a few present questions of substance. Many are unsubstantial, others are technical, and some are unsupported by the requisite evidence. We shall notice those only we think deserving, and shall group many of them together.

The first subject of remark are the objections to the jurors. In *Dyott* v. *The Com'th*, 5 Wharton, 67, it was held, that after a prisoner stands mute, a plea of not guilty is entered for him, and he participates in the trial and is convicted, the case falls within the provisions of the act of 21st February, 1814, enacting that a trial on the merits, or pleading guilty on the general issue, shall be a waiver of all errors and defects, or appertaining to the precept venire, drawing, summoning and returning of the jurors. This decision resulted from the language of the act of 23d September, 1791, relating to prisoners standing mute or challenging peremptorily more than the allowable number of jurors, that the trial shall proceed in the same manner as if the prisoner had pleaded not guilty, and put himself for trial on the country. We do not think this decision is applicable to a case where the prisoner makes his objections at first to the panel of jurors, and on their being overruled, takes a proper bill of exceptions; but the decision is strongly illustrative of the unwillingness of courts to sustain objections to the jury, grand or petit, after a full and fair trial on the merits. It is therefore, sufficient to say as to the first and eighth assignments of error, to the refusal of the court to quash the array of the grand and petit jurors, that the objections of the prisoner were squarely traversed by the commonwealth by plea, while the bill of exceptions contains no evidence of their truth. We

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must presume the court had sufficient ground to refuse the challenge.

The second, third, fourth and fifth errors raise the single question, whether, upon a challenge to the polls of grand jurors, the prisoner will be permitted to examine them on their *voir dire* to support his objections. The court was willing to receive other proof. As to petit jurors, who try the prisoner, and therefore should be above all exception, the rule is to permit them to be examined on their *voir dire* to prove objections to their competency. But the reason does not hold good as to the grand jurors, who do not try the prisoner, but merely enquire on the evidence of the commonwealth alone, whether there is sufficient probable ground of the commission of the offense charged in the indictment laid before them. It would be impossible to conduct the business of the courts of Quarter Sessions and Oyer and Terminer, if every person indicted for an offense could claim the right of polling the grand jurors on their *voir dire* in order to purge the panel. Indictments for murder may be found in the Quarter Sessions and certified in the Oyer and Terminer. A due regard for public policy, as well as for the interests of justice and the nature of the inquiry forbids that grand jurors should be polled and tried in this manner. If the prisoner have evidence to purge the panel let him produce it. Sixth assignment.—That a bill of indictment may be sent up to the grand jury by the attorney general, or was, by the district attorney, with the sanction of the court, is shown in *McCullough* v. *Com'th*, 17 P. F. Smith, 30. It does not appear that the bill before us was sent up surreptitiously. Tenth assignment.—The 41st section of the criminal procedure act of March 31, 1860, is a summary (say the codifiers) of the 144th, 145th, 146th, 147th and 148th sections of the act of 14th of April, 1834, which are left unrepealed. 1 Brightly, note C., p. 385. The *venire* awarded under 147th section, makes no distinction between the bystander and persons in the country at large. Nor does the 41st section of the act of 1860 make a discrimination. There is no ground therefore to support a distinction, and it certainly infringes no rule of right or of policy, to hold that under an order of *talesmen*, the *venire*, must issue the generally, and not specially to

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summon the bystanders only, or specially, for persons from the body of the county only, Under the criminal procedure act, the sheriff may summon the talesmen from either or both. The expression, *tales de circumstantibus*, was evidently intended to include both.

The 14th and 15th assignments relate to the evidence of finding the body of Daniel M. Kraemer three hundred yards from the house; the condition of the chest, bureau and desk, and the fact that a large sum in silver and gold was known to the prisoner to be in the house. That the commission of a distinct offense, even similar in character, cannot be given in evidence against the prisoner, was held in *Shaffner* v. *Com'th*, decided at Harrisburg, in 1873. But when two persons are murdered at the same time and place, and under circumstances evidencing that both acts were commited by the same person or persons, and were part of one and the same transaction or *res gestæ*, and tend to throw light on the motive and manner of the murder for which the prisoner is indicted, the case is different. Such was the case here. The club found near to the husband, being the probable instrument of the death of the wife also, and the motive, to-wit, robbery, being one and the same, which led to the murder of both at the same time. Being parts of the same *res gestæ* they, together, tend to throw light on each other, and there is no reason that the truth should be thrown out by excluding the evidences objected to. The 16th, 18th, 19th, 21st, 22d, 24th, 25th, 26th, and 34th assignments relate to the same subject. When we consider that Kraemer was a farmer, living in the country remote from a place of safe deposit, and was unused to the ways of men living in town; that it was a period of suspension of specie payments, when silver and gold seek hiding places in the chests, drawers and desks of such men as he, and often remain hidden for years, we cannot say the time when he and his wife received the coin was too remote, and its possession on the night of the murder impossible. The prisoner was the son of a neighboring farmer, and was without means of his own. This possession of coin and exchanging it for paper money and purchase of clothing, on the next day, at Pottsville, were significant circumstances, while the evidence of his identity as

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the person exchanging the coin in Pottsville might require the testimony of many witnesses and many circumstances, to make the proof complete. We discover no error in these assignments.

23d assignment. The fact that a witness was examined in a certain prosecution, is a matter independent of the record. He may state that fact as inducement, without producing the record: when the purpose is merely to prove the identity of the person then on trial. The most important question which arose in the trial was that to which the 28th, 29th and 30th assignments relate, to-wit: the admissibility of the so-called confessions of the prisoner to John J. Kaercher. But we meet an unsurmountable obstacle to its decision in the fact that the testimony of Kaercher, and of the witnesses called to show the influence used to obtain the confessions, has not been made a part of the bills of exception.

Without the whole of the testimony of these witnesses before us, to enable us to sift it, and discover the nature and extent of the influence used, it would be very unsafe to say the judge erred in admitting the confessions. We cannot say that he subsequently erred in submitting it to the jury on the evidence, to say whether any improper influence was used, and in charging them, if there were any, that they should disregard the confessions. This did the prisoner no harm, and might, if true, have availed him much. It is proper, also, to add that the disclosures drawn from the prisoner were rather deductions of certain specific facts than confessions of guilt. It is true that these facts were links in the chain of circumstances to convict the prisoner, and therefore his admissions were to be strictly guarded against any improper influence used to obtain them, but they stand lower in the degree of evidence, than actual confessions of guilt. A damaging fact may be admitted without any intention to confess guilt.

The 31st, 32d and 33d assignments relate to the testimony of Joseph Trumbo, who was permitted to testify to conversations with the prisoner through the soil pipes of the prison. Whether the voice of the prisoner could be recognized by Trumbo through the pipes, and what weight would be given to testimony, were matters within the province of the jury.

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If the offer of such evidence had come from the prisoner, it would have been an error to reject it. *E converso* it was not error to receive it on part of the commonwealth.

Speaking tubes are used in all large hotels and business houses, and it would be going too far to say, as a matter of judicial knowledge, that the voices of those speaking through them cannot be distinguished. The 35th, 36th and 37th assignments are defective, in that the evidence is not made a part of the bills of exception.

The offers of evidence distinctly state that the dying declarations of Mrs. Annetta Kraemer were made when she was fully conscious of her approaching death. In the absence of evidence to prove the fact to be otherwise, we must presume that the evidence of her consciousness of approaching dissolution, was sufficient as well as satisfactory to the court.

The whole charge is assigned for error. There seems to be no good reason for this. We discover nothing erroneous in the portion commented upon in the argument. The indictment consisted of a single count for murder, and the court told the jury that under it they might either acquit or find the prisoner guilty of murder in the first or second degree, and they should find the degree of murder in their verdict.

The complaint against this part of the charge is that the court did not instruct the jury that there might be a conviction of manslaughter under the count for murder. The court was not asked to give any instruction on the subject of manslaughter, and for the very good reason that nothing appeared in the evidence on the part of the commonwealth or of the prisoner, to reduce the homicide to manslaughter. It was a question whether the prisoner was the guilty one who took the lives of this aged couple; but there was no question that the homicide was a foul and devilish murder committed for the purpose of robbery. It was no substantial injury to the prisoner therefore to omit to instruct the jury that, as an abstract principle of law under a count for murder, there may be a conviction of manslaughter.

The other assignments of error need not be noticed. We discover no error in the record, and the sentence and judgment

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of the Criminal Court is therefore affirmed, and the record ordered to be remitted for execution.

This case is but another evidence of the tendency of courts to submit to the jury in criminal cases all the evidence, and let the jury, with all the evidence before them, pass upon every question in the case. As was said in an article upon dying declarations, on page 14 of the JURIST, "The great caution sanctioned by the books in regard to this kind of evidence would seem to demand a rule of practice uniform, free of all embarrassment and nice distinction; and which, in its operation, will not deprive the jury of any fact or circumstance tending to enlighted them upon the main point of inquiry—the guilt or innocense of the accused," and I can see no good reason, when the question of the admissibility of the confession of the prisoner shall arise, if it shall appear *prima facie* to the court, that such confession was made under circumstances that would make the same admissible in evidence, that the same should be admitted, and the question submitted to the jury to say, from the whole evidence, whether any improper influence was used, and instruct the jury, that from the whole evidence in the case, it should appear that any improper influence was used, that they should disregard the evidence of such confession. It is difficult in practice, for the court to determine on the trial, when such evidence is offered by the prosecutor to determine whether or not any improper influence was used in a particular case; but on the contrary upon the entire evidence, the court and jury can almost uniformly arrive at correct conclusions. See also, article on dying declarations, page 12 of JURIST.

Supreme Court of Illinois.

OPINION FILED JAN. 30., 1874.

CHARLES W. ALLEN et. al. v. JOHN WATT.

APPEAL FROM COOK.

AFFIDAVIT OF PLAINTIFF'S CLAIM—DEFENDANT'S PLEA AND AFFIDAVIT OF DEFENSE TO PART.

ACT OF 1871—PLAINTIFF'S AFFIDAVIT OF CLAIM AND DEFENDANT'S OF DEFENSE.—The plaintiff filed his affidavit of claim with his declaration. The defendant filed his plea of the general issue, with an affidavit of defense to the amount of $42. The plaintiff then filed a written admission, that that amount mlght be deducted, and asked a judgment for the residue. The defendant asked for a continuance until a pending suit in Ohio should be determined. The court refused the motion, and on the evidence rendered judgment for the plaintiff for the amount of his claim, less the $42: *Held*,

1. That the affidavit filed with the plea should disclose with reasonable certainty the entire ground of defense relied upon.

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2. That if the affidavit was true, this was all the defense there was to the suit.

3. That having in the affidavit alleged one defense, which had been confessed, it was not competent to set up an additional defense not included in the affidavit.

4. That the motion for a continuance was properly overruled, as the mere pendency of a suit in one State cannot be pleaded in bar or abatement of a second action in another State, even between the same parties and for the same cause of action.

5. The court does not pass upon the objection that it does not appear that both of the defendants reside in the county in which the suit was brought, the objection being urged for the first time in the Supreme Court.

Opinion of the court by

SCHOLFIELD, J.—This was assumpsit by appellee against appellants on a special contract.

Affidavit was filed with the declaration showing the nature of the plaintiff's demand, and the amount due him from the defendants, after allowing to the defendants all their just credits, deductions, and set-offs.

The defendants pleaded the general issue, and with it they filed an affidavit, stating that they had a good defense to the merits of the suit to the amount of forty-two dollars.

Subsequently the plaintiff filed a written admission that the sum of forty-two dollars, in the defendants' affidavit mentioned, might be deducted from his claim, and moved the court for a judgment for the residue. The defendants then moved the court for a continuance in the cause, which was supported by the affidavit of their attorney. The affidavit alleges, as cause for a continuance, "that in the city of Cincinnati, in the county of Hamilton, and State of Ohio, Henry Worthington and Joseph Power, have brought their suit versus the plaintiff, John Watt and —— Johnson, for a larger sum than the amount claimed by Watt in this action, and that in said court in Ohio, these defendants are made defendants, and any sum due and owing by these defendants to Watt is attached, and the said watt is prevented and prohibited from collecting from them. Therefore, these defendants move the court to continue this cause until the case in Ohio can be tried."

The court overruled the motion, and, after hearing evidence, rendered judgment for the plaintiff for the amount of his claim

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as stated in his affidavit, after deducting the defendants' set-off of $42. To this the defendants excepted.

It is argued that the court erred in overruling the defendants' motion for a continuance, and rendering judgment for the plaintiff.

The 36th section of the practice act, (Laws of 1871, p. 344,) provides: "If the plaintiff, in any suit upon a contract, expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, if the defendant is a resident of the county in which the suit is brought, shall file with his plea an affidavit *stating that he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand*, and if to a portion, specifying the amount, (according to the best of his judgment and belief).

We perceive no ambiguity in this language. It is reasonably plain and concise, and it leaves no doubt upon our minds that it was intended by the legislature that the affidavit filed with the plea *should disclose with reasonable certainty, the entire ground of defense relied upon*, other than such as is of a dilatory character, which is, by a subsequent proviso, expressly excepted. The affidavit here interposed a set-off to the amount of forty-two dollars. This was allowed. If the affidavit was true, this was all the defense there was to the suit, for although it is not expressly said that this is all the defense the defendants have, such is the necessary implication.

Having in the affidavit alleged one defense, which has been confessed, it is not competent to set up an additional defense not included in the affidavit. The defendants having been allowed all that they claimed, the judgment does them no injury.

But even if the defendants had been entitled to set up a defense other and different than that stated in their affidavit, their motion for a continuance was properly overruled, for if the record of the suit pending in Ohio had been present, it would not, as it is described in the affidavit for continuance, been compe-

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tent evidence in the case. It is not shown to have been the same cause of action, or between the same parties as in this case, nor is it shown that the suit is terminated. It is well settled by the authorities that the mere pendency of a suit in one State, can not be pleaded in bar or abatement of a second action in another State, even between the same parties and for the same cause of action. *McJilton* v. *Love*, 13 Ill., 486.

It is finally objected that it does not appear that both of the defendants reside in the county in which the suit was brought, and that the judgment is therefore erroneous. This objection is urged for the first time in this court. No attempt was made to urge it by plea in abatement, or otherwise, in the court below. Without undertaking to say what the objection would have availed, had it been urged in apt time, it is sufficient to say that it comes too late after a plea in bar and affidavit of merits have been filed. The filing of a plea in bar, operates as a waiver of a plea in abatement previously filed. *Lindsay* v. *Stout*, 60 Ill., 491. The rule is general that all objections to the writ, or to the jurisdiction of the person, must be urged before the filing of a plea in bar, or they will be waived. *Frink* v. *Flanagan*, 1st Gilm., 35; *Town of Harlem* v. *Emmert*, 41 Ill., 319; *Davis* v. *Taylor*, ibid, 405; *Mason* v. *Tiffany*, 45 id., 392; *Gilson* v. *Powers*, 16 id., 355.

The judgment of the court below is affirmed.

AFFIRMED.

Moore & Caulfield, for appellants.
M. W. Robinson, for appellee.

The Statute of Illinois, Laws of 1872, page 344, § 36, provides that, "If the plaintiff in any suit upon a contract expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney, if the defendant is a resident of the county in which the suit is brought, shall file with his plea an affidavit stating that he verily believes he has a good defense to said suit, upon the merits to the whole or a portion of the plaintiff's demand; and if a portion, specifying the amount, (according to the best of his judgment and belief). Upon good cause shown, the time of filing such affidavit may be extended for such reasonable time as the court shall order. No affidavit of merits need be filed with a demurrer

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plea in abatement or motion; *Provided*, that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court, but expects to produce by the next term, the court shall continue such cause until the next term." § 37 of the same act provides that, "When any part of the demand is upon an account, and the defendant shall suffer default, for the want of an affidavit of merits, for or non-appearance, or for *nil dicit*, the affidavit so filed with the declaration, may be taken as *prima facie* evidence of the amount due upon such account, but the court may require further evidence." The affidavit filed with the plea is a part of the plea, and is preserved in the record without a bill of exceptions. *Whiting* v. *Fuller*, 22 Ill. 33, and it would seem that the affidavit filed with the declaration forms a part thereof, and would, like an affidavit to a plea, be preserved in the record without a bill of exceptions. In cases where there is more than one plaintiff, it is sufficient if one of the plaintiffs make the affidavit filed with the declaration. *Haggard* v. *Smith*, Supreme Court, Jan. Term, 1874; and when two or more persons are sued and plead jointly, an affidavit of merits may be made by one of them. It is otherwise when they plead separately. *Whiting* v. *Fuller*, *supra*, and affirmed in the case of *Haggard* v. *Smith*, et. als., *supra*.

The case of *Haggard* v. *Smith*, et. als. was upon an open account. With the declaration was filed an affidavit sworn to by one of the plaintiffs. The defendants filed the general issue, and with it their joint affidavit, in which they say they verily believe they have a good defense upon the merits to a portion of said plaintiffs claim, viz: $65.00. Whereupon the plaintiffs by their counsel stipulated to deduct from the amount of the account sued on, $65.90, and entered a motion to strike defendants plea and affidavit from the files, and for a rule upon the defendants to plead anew to the declaration. The plea and affidavit was stricken from the files by the Circuit Court, and a rule entered against the defendants to plead to the declaration to this ruling, the defendants excepted. The defendants having failed to plead to the declaration within the rule, judgment was rendered by the court as by *nil dicit*, for the amount of the account, less the stipulated sum of $65.90.

It was held that the ruling of the Circuit Court was authorized by the spirit, if not by the very letter of the act above cited. The court say: "The object of the statute is to prevent vexatious delays by parties filing pleas." And if the defendant has not a defense, he can support by his own affidavit, he ought to let the plaintiff have judgment; and the court hold that if the defendants had any further defense that it was their duty to plead it within the rule entered against them to plead. Citing *Hurst* et. als. v. *Burr* et als., 22 Ill., page 29, and holding that the Cook county statute under which the early cases on this question were decided, is similar to our present statute. When the defendant files the general issue it must either be stricken from the files, or there must be a trial on the merits. In the case of *McDonnell* v. *Horter*, 22 Ill., 28, the court, per Caton, C. J., say: "The plea of the general issue was regularly filed, and was never stricken from the files. On this state of the record, the court

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assessed the damages as if upon a default. If the affidavit of merits, which was filed with the general issue was insufficient. the plea should have been stricken from the files. While it remained it was a bar to the action till tried by a jury or by the court, with the consent of the parties. in place of a jury. and found to be untrue. There was no such trial. nor indeed was there any issue formed on this plea. It stands upon the record as a simple naked bar to the action."

The question frequently arises. as to what constitutes a filing of the affidavit with the declaration. This question has not been decided to my knowledge by the Supreme Court. The language of the statute is. "shall file with his declaration an affidavit," &c. I am advised that some of the circuit judges have held that the affidavit must be filed at the same time the declaration is filed, and others holding that the affidavit may be filed at any time after the declaration; provided, that the same is filed more than ten days before the return day of the writ. If the affidavlt forms a part of the declaration, and becomes a part of the record without the aid of a bill of exceptions. as it seems to me clear that it does. then it should be filed with the declaration, and can only be filed afterwards by leave of court to amend the declaration. by adding thereto such affidavit.

Amendments are allowed by § 23 of the practice act, on such terms as shall be deemed just and reasonable, and under this section the court would be authorized to allow the plaintiff to amend hls declaration by filing with the same the affidavit. Under the statute. and to the declaration as thus amended. the plaintiff would be entitled to a short rule to plead, unless the defendant apply for time to file the affidavit. under the provision of the statute above cited, and if. in the judgment of the court time should be given to file the affidavit with the plea. reasonable time should be given. While it is the duty of the court to require a high degree of diligence in the preparation of the pleadings, yet for good cause shown. time should be given to file the affidavit. And when the affidavit sets up a defense to a portion only of the plaintiff's claim, and plaintiff is willing to stipulate to deduct from the amount of his debt. the amount of the claim set up by the defendant; then, on the filing of such stipulation and a motion to strike the plea and affidavit from the files, and for a rule to plead over to the declaration. the motion should be sustained; and if the defendant fails to plead within such rule, judgment should be rendered by *nil dicit* for the amount of the claim sued for, less the sum stipulated. See *Haggard* v. *Smith* et al *supra*.

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Supreme Court of Illinois.

VORIS v. SLOAN.

1. On the 26th day of April, 1850, George Morton, conveyed to Francis and Samuel Voris, as trustees for his daughter, Christiana Morton, in consideration of natural love and affection for his daughter Christiana and one dollar, the whole of Block 103, in Morton, Voris and Laveille's addition to the city of Peoria, to have and to hold the said premises, with the appurtenances, unto the said parties of the second part, or the survivor of them, in trust for the benefit, use and behoof solely, of the said Christiana Morton, and the heirs of her body forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Christiana Morton, during her natural life, with a remainder to the heirs of her body; and in case she should die without issue, then, in that case the legal title to revert to the said party of the first part or his heirs.

2. The trustees had advanced $979.74 for taxes advanced, and the property was unproductive.

3. The first question, and that which lies at the threshold is, whether the court has power to break in upon the terms of the trust, and to prevent or change the terms of the trust, and to prevent or change the terms and conditions imposed by the creator of the trust. Held, that the power may be exercised by the courts.

4. The language employed in declaring the trust, "and in case she should die without issue, then, in that case the legal title to revert to the party of the first part or his heirs." Construed and held, under this declaration of trust, that Mrs. Sloan took a vested unconditional life estate, and that the remainder, vested in the heirs of her body at their birth, each taking a share, subject to be diminished as others should be born.

5. That as each child at birth took an equitable fee in the premises, and that on the death of one of the heirs the survivors would inherit their share in the proportion, and in the manner prescribed by our statute of descents.

6. Had the deed contained no limitation over to the grantor or his heirs, then, at common law the children of her body would have taken an estate tail.

7. Entails are abolished by our statute, affirming *Bracraft* v. *Strawn*, and *Butler* v. *Heustis*.

Opinion by

WALKER, J.—On the 26th day of April, 1850, George Morton conveyed to Francis and Samuel Voris, as trustees for his daughter Christiana Morton, in consideration of natural love and affection for his daughter Christiana and one dollar, the whole of block 103, in Morton, Voris and Laveill's addition to the city of Peoria, "to have and to hold the said premises with the appurtenances unto the said parties of the second part, or

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the survivor of them in trust for the benefit, use and behoof solely of the said Christiana Morton, and the heirs of her body forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Christiana Morton during her natural life, with a remainder to the heirs of her body; and in case she should die without issue, then, in that case the legal title to revert to the said party of the first part or his heirs."

At the time this conveyance was made Christiana was unmarried. The trust was accepted and Francis Voris, died on the first day of May, 1852, but Samuel still survives. Christiana, in 1852, married Joseph Sloan, and of the marriage Elizabeth and Sophia were born, and are the only children of the marriage now living, two others having died after her husband. Sophia is eighteen and Elizabeth fourteen years of age. That Sloan and his family resided in New Orleans; that he lost his large wealth during the rebellion, and he and his family were thereby reduced to poverty; that in the year 1861 he died, leaving his wife and children with no means of support; that Christiana has exhausted all her means in supporting her children; that they have no other property; that this property is vacant and unoccupied, and is unproductive; that the same cannot be rented, because of the uncertain tenure and term for which it could be held, so as thereby to render it productive. That the yearly taxes on the property are about $200, and that she and her children are unable to pay the same; that the trustees have advanced $979.74 to pay the taxes, and the trustee is unable to advance more, and the property will be sold for taxes. That the premises are worth about five or six thousand dollars. That Christiana is the regularly appointed guardian for the children, and is acting as such.

The bill was filed by Mrs. Sloan in her own right, and as guardian of her daughters. Pending the suit Sophia came of age, and on her application she became a complainant in her own right. The bill charged the foregoing facts, and made Samuel Voris a defendant. He answered the bill and admitted the facts to be true. On a hearing, the Circuit Court found that the title to the premises was a life estate in Christiana Sloan, with a remainder in fee in Sophia and Elizabeth Sloan. That the prem-

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ises would sell for a better price if the title of all the owners should be sold together, and that Christiana consented that the sale be so made. The court according to the prayer of the bill decreed the sale at auction, and ordered the trustee to sell the premises entire or in subdivisions so as to obtain the best price after giving twenty days notice, one third of the purchase money to be in cash, the balance in equal installments at one and two years. That, of the proceeds of the sale, Christiana to receive the value of her life estate in the premises, and the residue be paid to her as guardian of her children. But the value of the life estate is not fixed by the court. It further directs that the trustee retain $978.74 for taxes advanced by him and never refunded.

We have received no aid from the brief of counsel for plaintiff in error, as he only assigns the error that the court should not have granted the relief sought and refers us to no authority, nor does he urge any reason why the decree should be reversed. We shall therefore discuss such questions as are suggested by counsel for defendant in error, or as have occurred to us. The first question, and that which lies at the threshold, is whether the court has power to break in upon the terms of a trust and to prevent or change the terms, and conditions imposed by the creator of the trust. In the case of *Curtis* v. *Brown*, 29 Ill., 201, after a review of the authorities, it was determined that the power might be exercised in extreme cases. A case was then instanced where the property might be unproductive, and where the *cestui que trust* was absolutely perishing from want, or was forced to the poor house, or where the trustee could not possibly raise the means to pay the taxes on the property and thus save it from a public sale, when the court of chancery would interpose its powers. Thus it is seen that it is only in cases of the most urgent necessity that the terms of the trust will be changed, and the fund applied to other or different uses from those fixed in the trust deed.

From the evidence it appears that the mother and daughters have no means with which to support themselves, or to pay the taxes that are accruing and annually increasing on the property. This is the testimony of Mrs. Sloan, and there is nothing to con-

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tradict it in the record. Some of the witnesses, and one of them the trustee, swear that all reasonable efforts have been made to lease the property, but without success, not even being able to do so for enough to pay the taxes. And they fix its value at five or six thousand dollars. We think this a case justifying the interposition of the court, as otherwise the property would probably be lost before the minors would come of age, even if they could then sell and pass the title. The language employed in declaring the trust is not free from doubt. The expression, "and in case she should die without issue, then in that case the legal title to revert to the said party of the first part or his heirs," is uncertain. The ambiguity arises, and the difficulty presented is, whether the grantor intended that the remainder should rest on the birth of children of her body, or whether it was suspended until the death of Mrs. Sloan. It is true that in this case the children take if at all as purchasers. See *Bracraft* v. *Strawn*, (January term, 1873,) and *Butler* v. *Heustis*, present term. The mother only took a life estate, and the children took a contingent remainder. When did this remainder vest, or has it, or can it vest until the death of the mother, leaving the children surviving her? In other words was the contingency met and performed when the children were born, and did the fee then become absolute, or must the children survive the mother before the fee becomes unconditional in them? Had the deed contained no limitation over to the grantor or his heirs, then it is manifest that at the common law the children of her body would have taken an estate tails, but as entails have been abolished by our statute, they would at birth have taken a fee. *Bracraft* v. *Strawn* and *Butler* v. *Heustis*, *supra*.

But does the limitation over and the language "should she die without issue" produce a different result? This depends upon whether the language shall be construed to mean without having had issue. If that is the true construction, then upon the birth of a child or children of the body the contingency was fulfilled, and the fee vested in them, and the limitation over was defeated. If on the other hand, this language means that if she died leaving no issue surviving her, the contingency remains open and the title has not vested in the children and cannot until the death

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of their mother, and they or one of them shall thus survive her. In the case of *Barlow* v. *Salter*, 17 Ves., 479, Sir William Grant, master of the rolls, in construing a devise over, in these words, "in case she dies without issue," said that it was necessary to decide the meaning of these words, whether they are to be construed without issue generally or at the time of the daughter's death. He said that it appears in some of the earlier cases that the judges inclined to hold these words to mean without issue at the death of the person named; but ever since the case of *Beauchdkep* v. *Daxiner*, 2 atte., 308, I think a different rule has prevailed; and it is now settled, that unless there are expressions or circumstances from which it can be collected, that these words are used in a more restricted sense, they are to have their legal significance; namely, "death without issue generally." The language in that devise and in this deed are essentially the same and no distinction can be justly taken between them. The same rule of construction must govern in both cases. If we examine all of the language employed, we find nothing in this case to restrict the legal signification as determined in those English decisions.

The property is declared to be "in trust for the benefit, use and behoof solely of the said Christiana Morton and the heirs of her body forever." And in case the trustee should die it is further declared that she shall hold the premises during her natural life, with a remainder to the heirs of her body. We can perceive nothing in the language implying any intention to restrict the vesting of the title to the heirs she might have at her death, but to vest the title in the heirs of her body generally. It then follows that under this declaration of the trust that Mrs. Sloan took and then vested in her an unconditional life estate, and the remainder vested in the heirs of her body at their birth, each taking a share subject to be diminished as others should be born. It then further follows, that as each child at birth took an equitable fee in the premises, that on the death of the two women Sophia and Elizabeth survive, their heirs inherited their shares in the proportions and in the manner prescribed by our statute of descents. Under that statute the mother inherited from each at its death two shares in the portion it held in fee. This being the case the decree of the court below is in this respect errone-

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ous, inasmuch that it only allows the mother payment out of the sale for the present value of her life estate. And it was proper that the court should find its value, and not embarrass the trustee by requiring him to ascertain and pay her its value. And in fixing its value, as fair and equitable a rule as can be adopted is, that provided by our statute to ascertain the present value of estates of dower in lands. The decree of the court below is reversed and the cause remanded for further proceedings, in conformity with this opinion.

This case presents two questions that are of vital importauce to the profession, not only in this State, but throughout the country.

1st. That courts of chancery have power in extreme cases, to order a disposition of trust estates, which is not in accordance with the deed creating the trust.

2d. The construction of the words of limitation, contained in the deed.

The importance of the decision upon the first point cannot be overestimated. That exigencies often arise, not contemplated by the party creating the trust, and which, had they been anticipated would undoubtedly have been provided for. Where the aid of a court of chancery must be invoked to grant relief, and in such case the court must as far as may be, occupy the place of the party creating the trust; and do with the fund what he would have dictated had he anticipated the emergency. *Curtis* v. *Brown* et als., 29 Ill., 201. The manner in which the case of Curtis arose, although one of the most ably argued and ably considered cases in our reports, left a doubt as to the extent of the power of a court of chancery in such cases; but the disposition of the question by Justice Walker, in the principal case, will dispel all doubt, and settles the law in this State on a firm basis, "that courts of chancery may act in extreme cases." But there are certain distinctions that must be observed in the Curtis case *supra*. The court on page 201 say: "Upon the question of the power of a court of chancery to break in upon and change the terms of a settlement common in England, there are decisions which would indicate that the rule is different where the subject matter is personal property, from what it is where the subject matter is real estate. There is another distinction which may be recognized in their decisions upon the power of the courts to deal with real estate, and that is, where the beneficiaries are infants, the rule seems to be different from what it is where they are adults, but laboring under disabilities." These distinctions will be fully understood by an examination of the Curtis case, and the authorities cited by the court and counsel. The rule is correct and must exist in the very nature of things, and the power must exist somewhere in the community to grant relief in such cases as fall within the rule; and under our system of jurisprudence that power is vested in the courts of chancery.

The rule must not be relaxed nor the power imprudently exercised; and unless the case falls clearly within the rule relief should be denied.

Upon the second point, in order to properly understand the principal case

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and other unreported cases that will be hereafter cited in this note, it is necessary to refer to the case of *Baker* et. als. v. *Scott*, 62 Ill., 86, per Breese, J. In this case the court in discussing the rule in Shelly's case say: "That case arose in the twenty-third year of the reign of Elizabeth, about the year 1579, near three hundred years ago, and is reported in 1 Coke's Rep. side paging 93 b., wherein among other rulings it was held, where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, either in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase.

Preston, in his elaborate treatise on "Estates," devotes a chapter of near two hundred pages to a critical and searching analysis of this rule, and says the rule may be thus expressed: First. When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and afterward in the same deed, wlll or writing there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable to his heirs generally, or heirs of his body by that name, in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself, to the estate or interest imparted by that limitation.

He expresses the rule secondly, thus: Whenever the ancestor takes an estate of freehold or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed, in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance.

A third and still more accurate expression of the rule is as we have stated it at the outset, taken from the rulings of the court as found in the reported case. The author further says, this rule has been expressed with greater precision by one of the very able counsel, Sergeant Glynn, in *Perrin* v. *Blake*, to be: "in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate, if it be limited to the heirs of his body he takes a fee tail, if to his heirs a fee simple." The court in the same case say: "This rule is venerable for its antiquity, having received the sanction of the highest courts in England as early as the 18 of Edward II, and is based on their authority as found in the year books of that and subsequent reigns. That this rule was a part of the common law of England, and an established axiom in the law of real property in that realm, for near five-hundred years is not and cannot be denied." 4 Kent's Com., 243, *Baker* et. als. v. *Scott*, 62 Ill., 94. That the rule is in force in this State is fully affirmed by the court in that case. And our Supreme Court having decided that the rule in Shelly's case is in force in this State, and having defined the rule, I apprehend the only difficulty will be found in the application of the rule. It will be observed that the rule has application only to estates of freehold, and that as to all estates less than a freehold the rule has no application. An estate of freehold or frank tenement, is defined to be the possession of

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the soil by a freeman; the possession of the land is called in the law of England, the frank tenement or freehold. Such estate therefore, and no other, as requires actual possession of the land, is legally speaking a freehold. Tenants in fee, tenants in tail, and tenants for life are said to have a frank tenement. So called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. By the common law, the word heirs was necessary in the grant or donation of land, in order to make a fee or inheritance, says Blackstone. "For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life." To obviate this relic of very great nicety of feudal strictness, about the insertion of the word "heirs," this rule of the common law has been modified in several of the States. Our statute R. S. 1845, § 13, page 105, provides that "every estate in lands which shall be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law." A conditional fee at the common law, was a fee restrained to some particular heirs, exclusive of others. As to the heirs of a man's *body*, by which only his lineal descendants were admitted in exclusion of collateral heirs, or to the heirs male of his body, in exclusion both of collaterals and lineal females also. It was called a conditional fee by reason of the condition, expressed or implied, in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law, to all grants whatsoever, that on failure of the lands specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee simple. Now with regard to the condition annexed to their fees by the common law. Our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but if he had, it should then remain to the donee. They therefore called it a fee simple, on condition that he had issue. Now we must observe says Blackstone, that when any condition is performed it is thenceforth entirely gone, and the thing to which it before annexed becomes absolute and wholly unconditional; so that as soon as the grantee had any issue born, his estate was supposed to become absolute by tke performance of the condition at least for these three purposes. 1. To enable the tenant to alien the land, and thereby to bar, not only his own issue but also the donor of his interest in the reversion. 2. To subject him to forfeit it for treason, which he could not do until issue born, longer than for his own llfe, lest thereby the inheritance of the issue and the reversion of the donor might have been defeated. 3. To empower him to charge the land with rents, commons and certain other incumbrances, so as to bind his issue. Black. Com. Book 2, top page 87, *Willion* v. *Berkly*, Plow. 233. And thus stood the old law. Yet

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it is necessary to understand the ancient common law thoroughly in order to understand the law as at present administered in this country. In the case of *Willion* v. *Berkly*, *supra*, Lord Chief Justice Dyer said: "Upon the grant of a conditional fee the fee simple vested in the beginning; by having issue the donee acquired power to alien which he had not before, but the issue was not the cause of his having the fee, the first gift vested that." Says Justice Blackstone, "The inconvenience which attended these limited and fettered inheritances were probably what induced the judges to give way to this subtle finesse of construction, (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But on the other hand the nobility who were willing to perpetuate their possessions in their own families to put a stop to this practice, procured the statute of Westminster the second, (13 Edward 1, chap. 1,) (commonly called the statute *de donis conditionalibus*,) to be made, which paid a greater regard to the private will and intention of the donors than to the propriety of such intention or any public consideration whatsoever. This statute revised in some sort the ancient feudal restraints which were originally laid on alienations, by granting that from thenceforth the will of the donor be observed, and that the tenements so given, (to a man and the heirs of his body), should at all events go to the issue if there were any, or if none, should revert to the donor." Upon the construction of this act of Parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal the instant any issue was born, but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee tail*, and investing in the donor the ultimate fee simple of the land expectant, on the failure of issue; which expectant estate is what we now call a reversion. Black Book 2, top page 89, *Blair* et als. v. *Vanblaricum*, Supreme Court, Jan. term, 1874. The expression *fee tail*, or *feodum tollitatum*, was borrowed from the feudist, among whom it signified any mutilated or truncated inheritance from which the heirs general were cut off, being derived from the barbarous verb *taliare*, to cut, from which the French *tailer*, and the Itallan *tagliare* are formed. Spelm's Gloss, 531. As to what may be entailed, and the species of estates tail, and the nature of such estates, see Black. Com. Book 2, top page 89. Also, *Blair* et. als. v. *Vanblaricum*, *supra*. By our statute, estates in fee tail are converted into estates for life. § 6 of the conveyance act, laws of 1872, p. 283, provides that, "In cases where by the common law any person or persons might hereafter become seized in fee tail, of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant or other conveyance hereafter to be made, or by any other means whatsoever, such person or persons instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and are seized thereof, for his or her natural life only, and the remainder shall pass in fee slmple, absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance." As held in the principal case, and in *Butler* et. als. v. *Heustis*, Sept. term, 1873, and *Bracraft* v.

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Strawn, Jan. term, 1873, that this section of the statute abolishes estate tail in this State, and converts the same into life estates. Yet a thorough knowledge of the law of estates tail, is absolutely essential, in order to apply the rule in Shelly's case to any given case. In *Baker* et. als. v. *Scott*, *supra*, it was held that the requisites of the rule in Shelly's case, are that there must in the first instance be an estate of freehold devised, there must be a limitation to the heirs or the heirs of the body of the person taking that estate by that name; and not to the heirs as meaning or explained to be, sons, children, &c., the heirs must be named to take as a class or denomination of persons in succession, from generation to generation; and by way of remainder or at least so that the estate, so to arise from the limitation to the heirs, and the estate of freehold in the ancestor, shall both owe their effect to the same deed, will, or writing, and that the same limitations shall give interests of the same quality both legal or both equitable. All title must vest either by descent, or by purchase, consequently it was held in the Baker case *supra*, that the rule does not apply when the words lawful issue, sons or children, are used instead of "heirs," because those words are regarded as words of purchase and not of limitation, and the ancesstor, when such words are used will take only a life estate, and his sons and children will take by purchase or under the will, for the reason that they are a designation of persons to take originally in their own right, for the reason that the rule is, that when children take in character of heir they must take in quality of heir, that is by descent. The words of limitation in this case were, "and it is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education, until she is twenty-three years of age; after which she may come into possession of the full amount of rents and profits, the principal to descend to her 'heirs.'" And it was held that the rule in Shelly's case was applicable to such a devise, and by it the daughter took an estate of inheritance in fee simple. *Blair* et. als. v. *Vanblaricum*, Supreme Court, Jan. term, 1874, was this: The father of Mary G. Vanblaricum died testate, leaving her as his only child. The second clause of the will was: "I will, give, bequeath, and devise unto my daughter Mary Gamble, and to the heirs of her body, and to their heirs and assigns, all my real estate of every description and wherever situate, and in case Mary Gamble dies without issue, then the real estate hereby willed, shall go and descend to my brothers and sisters, and to their heirs and assigns, in equal proportion." Subsequently the daughter married Jacob C. Vanblaricum, and they filed the bill, alleging that plaintiffs in error, with other persons are the brothers and sisters of the testator, and claiming that the will vested in Mary Vanblaricum the unconditional fee simple to the lands of which the testator died seized, that the llmitation over to the heirs of her body, and in case of her death without issue, to the brothers and sisters of testator, is inoperative and void in law, but operates as a cloud upon the title, the bill prayed for a construction of the will, and that the limitation be declared void. The court state the ancient common law doctrine as stated *supra*, and that this ancient rule was changed by 13 Edw. 1, chap. 1, (de donis), and hold that an estate in fee tail have grown out of this stat-

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ute. affirming the principal case, and *Bracraft* v. *Strawn*, Jan. term, 1873, and say: "These cases hold that the rule in Shelly's case * * * does not apply, as words of procreation were not used so as to create an estate, which words are used in the cases referred to in this court." As the word heir is necessary to create a fee, so the word body, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited, and that under this will Mrs. Vanblaricum took a life estate only. It is also held, that independent of the statute, (§ 6 conveyance act), the heirs of her body, would have taken an estate tail, according to the statute of Westminster. That under the statute § 6 of the conveyance act, Mrs. Vanblaricum took a life estate with remainder over to the heirs of her body in fee simple, absolute, and that the limitation over is binding, both under the statute and at common law before the statute de donis. When such conveyance was made, and the parties died without issue the estate vested in the donor, and such would be the case under this deviseo unless its course is changed by the further limitation over, to the brothers and sisters of the testator. The contingency under which they may take may never happen, as the devisee now or hereafter may have heirs of her body, who will take the absolute fee in remainder. See *Butler* v. *Hustis*, et. als., *Chicago Legal News*, Aug. 22, 1874, 4 Kent's Com. side paging 274. 2 Blackstone, 112; 15 Pickering 112.

For cases where a fee is mounted on a fee, see *Tilbury* v. *Barbut*, 3 Atk., 617; 3 Leon, 111, holding that in that case the first taker takes the entire estate. See also, Fearne on Remainders.

ACCIDENT AS AN EXCUSE FOR NON-PERFORMANCE.

Whether and when the performance of a contract is to be excused by reason of an accident is a question of interest. It was raised in *Howell* v. *Coupland*, 30 L. T. Rep. N. S. 677. The defendant had contracted to sell to plaintiff "two-hundred tons of regent potatoes, grown on land belonging to the defendant at W., * * * to be delivered in September and October, * * * to be paid for when and as they are taken away." At the time of entering into the agreement, sufficient of the defendants land was sown with potatoes to produce a larger crop of potatoes than the two hundred tons contracted to be delivered by the plaintiff to defendant, but by reason of a blight, the land produced only eighty tons, which were delivered to the plaintiff. An action was now brought for the non-delivery of the remainder. It was argued for plaintiff that defendant was

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not the less liable, that in short by fixing the amount to be delivered he gave a warranty, many cases being quoted in support of his position. It is certainly a well-known rule of the law, that where there is an absolute contract to do any thing which is not unlawful, the contractor must perform it or pay damages for not doing it, although the performance of his contract has become even impossible in consequence of unforeseen accidents. Thus in the case of *Kearon* v. *Pearson*, 7 H. & N. 386, the defendant engaged by charter-party to load on board the plaintiff's ship a cargo of coals, "to be loaded with usual dispatch." The defendant began loading by bringing the coal in boats along a canal to the dock where plaintiff's ship was, but before the cargo was completed, a severe frost rendered the canal unnavigable, and the ship was detained thirty-four days. All the learned judges were of the opinion that the expression "usual dispatch" meant "usual dispatch of persons who have a cargo ready for loading," and that the defendants were responsible for the delay. Again, it is stated in 1 Roll. Abr. tit. "Condition" (G. 1) as follows: "Si le condition dun obligation soit en teil manner: Whereas Robert Crosse, the father, shall and will before such a day, surrender the moiety of the said copyhold tenement unto Robert, the younger, so that Robert the younger be thereof so seized, according to the custome of the mannor, if they so long live, then the obligation to be void. Les darren parrolls (if they so long live), ne font le condition solment, mes le surrender est parcell del condition." But this rule of law was held to be inapplicable under the circumstances. Mr. Justice Blackburn remarked that this was a contract for the sale of a specific thing, and construed it as an undertaking on the part of the defendant to deliver two hundred tons of potatoes out of the crop which these sixty-eight acres were to produce. His Lordship compared it to the sale of a portion out of a particular ship's cargo, and observed—with respect to the case of *Taylor* v. *Colwell*, 2 B. & S. 82, where plaintiff's counsel contended was laid down the rule of the necessity of absolute performance of a contract or payment of damages, that the *ratio decidendi* of that case was, "that the contracting parties must have contemplated the continued existence of the thing which was the subject-matter of

the contract—that they must have contracted subject to the condition that the thing did not perish before the time arrived for the performance of the contract." One remark of his Lordship marks very clearly the different liabilities incurred when the character of the sale varies: "Had the contract been to deliver a certain quantity of potatoes merely, it would not be a contract relating to a specific thing, and * * * notwithstanding the perishing of the crop, the defendant would still be liable for damages for the breach of the contract." Mr. Justice Quain and Mr. Justice Archibald concurred. The distinction thus drawn by our law, as well as by that of other countries, between contracts for the sale of a specific thing and other contracts of sale, is one that appeals to common sense; and it is of the highest importance, owing to the different liabilities to which contractors subject themselves, according as they contract to make a specific sale or not. In this, as in many other branches of law, indeed, in the application of all law, the difficulty is, not to see the utility and value of the general principle, but to succeed in demonstrating that the general principle applies to the particular facts.—*Albany Law Journal.*

SLANDER—JUSTIFICATION—DEGREE OF EVIDENCE REQUIRED.

The rule has been uniform in this State, since the State was admitted into the Federal Union, that where a plea of justification in an action for slander accuses the plaintiff of a crime, the defendant thereby virtually prefers an indictment against him for that offense, and to sustain the plea the guilt of the party charged must be established beyond a reasonable doubt. In other words, so far as the degree of proof is concerned, the plaintiff occupies the same position as if he were upon trial on an indictment for the offense charged in the plea. See *Crotty* v. *Morrissy*, 40 Ill., 477, *Darling* v. *Banks*, 14 Ill., 46; *Corbly* v. *Wilson*, January term, 1874. The wisdom of the rule I apprehend will not be questioned by any person familiar with legal

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proceedings, when a party makes a charge of crime against his neighbor, he ought to be prepared to prove the charge beyond a reasonable doubt; in other words he should be prepared with evidence sufficient to convict the party of the crime charged, and if he is not thus prepared he ought not to make the charge. Our legislature have seen proper to change this wholesome rule, by the third section of the act of 1874, Gross Statute, vol. 3, p. 402. Which provides that, "In actions for slander or libel, an unproved allegation of the truth of the matter charged, shall not be deemed proof of malice, unless the jury on the whole case find that such defense was made with malicious intent, and it shall be competent for the defendant to establish the truth of the matter charged, by a preponderance of the evidence." It will be noticed that this section makes a sweeping change in relation to the law of slander in this State. Under this section, in order to justify an increase of the damages by reason of the filing of a plea justifying the truth of the charge, it must appear from the whole evidence in the case, that the defense was made by the defendant with a malicious intent; and the defendant is only required in order to entitle him to a verdict on such plea, to prove the same by a preponderance of the evidence. This proof may come far short of satisfying the jury beyond a reasonable doubt of the guilt of the plaintiff as charged in the plea, and presents this anamoly in the law, that a man may charge his neighbor with the commission of any one of the crimes known to the law, and when sued for it, that he may defeat the cause of action without making proof that would authorize a jury to convict him of the crime. Yet the record is made that for all civil purposes he is guilty, under the criminal law he is not guilty. I apprehend that the relaxing of the rule, when understood by men disposed to slander their neighbors, will induce them to make the slander, and take the chances of the jury determining the preponderance in his favor. The reputation of every citizen should be protected by law. Nothing short of such protection is justice to the citizen, and it remains now to be seen, whether or not, anything short of the rule, the justice of which has been demonstrated by the experience of ages, will bridle the tongue of the slanderer.

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The rule that, in order to justify the increase of the damages by reason of the filing of the plea of justification, that it must appear from the whole evidence that the plea was filed with a malicious intent, is right on principle and is fully maintained by our Supreme Court in *Corbley* v. *Wilson*, *supra*, where it is held that the defendant has the legal right to file such plea; and the simple fact that he is unable to prove it to the satisfaction of the jury should not increase the damages, unless the jury shall believe from the evidence that the plea was filed with malicious motives, or in other words without any reasonable prospect of proving it.. The only change made by this section is the degree of proof required to be made by the defendant to sustain the plea of justification, allowing the defendant to justify by a preponderance of the proof. It is to the policy of thus relaxing the rule that I cannot assent; yet experience may demonstrate the wisdom of thus relaxing the rule that required the plea to be proved beyond a reasonable doubt. If so, I shall cordially yield my assent. By the rule established by this section, evil an disposed person may weave such a network of circumstances around his neighbor, that he may be able to charge him with a crime that would ostracise him from all good society. And when the person thus injured comes into court for redress, the defendant files his plea of justification, and the jury say to the plaintiff that you are not proven guilty of the crime charged against you, the evidence only slightly preponderates against you, and therefore under the law we find the plea proved, and the world say the plaintiff was guilty of the crime charged. The reputation of the citizen in my judgment should not hang on such slender thread. It should be favored by the law, as life, liberty and dower.

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Hon. SYLVANUS WILCOX.

Judge Wilcox, late Judge of the Fourth Judicial Circuit of this State, commenced the practice of the law at Elgin, in 1846, and continued in the practice up to June, 1867, at which time he was elected Circuit Judge. He was re-elected in June, 1873. His circuit, comprised of the counties of Dupage, Kane and Kendall, made a large circuit, and required almost his entire time to dispose of the business. By reason of ill health, brought on evidently by confinement in the court room, and excessive mental labor, the Judge felt it his duty to resign. It is the regret of all, that Judge Wilcox felt compelled to resign. He however, has the full satisfaction of knowing that he has the sympathy of the entire people of his circuit, and the judiciary of the State. His ability and integrity, and the great care he exercised to determine every question correctly, gave him the position he attained on the bench, and his decisions commanded the respect of all. We hope that rest and cessation from judicial labor will restore the Judge to health, and that he may again enter the practice of the profession in which he has spent his life.

Hon. H. H. Cody, of Napierville, has been elected to fill the vacancy occasioned by the resignation of Judge Wilcox.

BOOK NOTICES.

Puterbaugh's Chancery Pleading and Practice.

The object of this work, as stated by the author, is to present, in one volume of convenient size a practical treatise on pleading and practice in suits in chancery and proceedings of like nature, and to suggest forms for pleading, and other papers necessary for preparation by the practitioner. The work contains two hundred and fifty-two practical forms, given in connection with the various subjects under consideration. These embrace sixty forms of bills, fifteen of answers, seventeen of demurrers, seventeen of pleas, twelve of petitions, seventeen of affidavits, seventy-one decrees and decretal orders; the balance are miscellaneous. These forms seem to have been prepared with care, and the

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collation of authorities upon the questions considered will prove to be a great saving of labor. The book is adapted to our practice, and no practitioner in the State can afford to practice law without a copy in his office. The book will be found to be a great convenience to the profession.

Freeman on Judgments.

Mr. Freeman's "Treatise on the law of Judgments," appears to be unusually complete, and will prove a valuable accesston to our law literature. It is written with care, and covers a field of law on which no American treatise had previously been prepared, and hence collects in one volume an array of learning which has heretofore been scattered through many books. As the author in his preface well says: "A judgment is not 'invariably' the *end* of the law." There has been more constant persistence on the part of litigants to escape the consequences of judgments against them, than upon almost any other question. Questions frequently arise upon judgments collaterally and otherwise, that cannot be determined correctly without great labor. This labor Mr. Freeman has faithfully performed for the profession. A judgment, the climax of a lawsuit is frequently a greater source of complication than the lawsuit in which it was rendered. Every question, as it would seem, that can or may arise upon a judgment is discussed by the author, with reference to the authorities. The work is full proof of the industry of the author, and the best criticism we can make is to give a synopsis of the book. The author first defines and classifies judgments and decrees, and treats successively of the entry, *nunc pro tunc*. Entries, amendments and correcting judgments during the term; judgment rolls, records, vacating of judgments at common law and under the statutes, for mistakes, &c., void judgments, collateral, inquiries as to the jurisdiction of the court entering the judgment, constructive service, findings of jurisdiction, contempt, deceased parties, numerous parties, heirs and administrator, remaindermen, *cestui que trust*, corporation and stockholder, principal and surety, lis penden, ejectment, merger or former recovery. The judgment as an estopel, creation of the lien, of pleading, judgments, judgments of courts not of record, judgments of other States, judgments in rem, divorce and decrees in Admiralty.

Mr. Freeman's name was unknown to the profession, outside of his own State, until the publication of this work. I however apprehend that this work will make his name familiar to almost every lawyer in the country.

A. L. BANCROFT & Co., of San Francisco, the publishers, may congratulate themselves on the publication of a work that must attain a national reputation at once. It is the West to the East.

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SELECTION AND SUMMONING OF GRAND JURORS.

In England on the summoning of any session of the peace or on the issuing of a commission of Oyer and Terminer and jail delivery, there goes out a precept either in the name of the king or two or more justices, directed to the sheriff, upon which he is to return twenty-four men or more, out of which the grand inquest at the sessions of the peace or Oyer and Terminer are taken. In New England the selection is by lot, from a body of the most respectable citizens in the several towns in the county, whose names are kept in a box which is called the "jury-box," and from which jurors are drawn. In Illinois it is provided by statute, that, "If the grand jury shall be required by law or by the order of the judge for any term of court, it shall be the duty of the county board in each of the counties in this State wherein such court is directed to be holden, at least twenty days before the sitting of such court, to select twenty-three persons possessing the qualifications as provided in section two of this act, and as near as may be a proportionate number from each town or precinct in their respective counties, to serve as grand jurors at such time, and to cause their clerk, within five days thereafter, to certify the names of the persons so selected as grand jurors, to the clerk of the court for which they are selected, who shall issue and deliver to the sheriff of the county wherein the

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court is to be held at least ten days before the term of the court for which they shall have been selected; or, during term time if the court shall so order, a summons commanding him to summon the persons so selected as aforesaid, to appear before such court at or before the hour of eleven o'clock A. M., on the first day of the term, or upon such other day as the judge shall direct, to constitute a grand jury for such term. The sheriff shall serve such summons in the manner provided in section eleven of this act for service of summons on petit jurors, and for any refusal or neglect so to do, shall be deemed guilty of contempt of court, and may be fined therefor as provided in section eleven of this act for default in summoning petit jurors. If for any reason the panel of grand jurors shall not be full at the opening of such court, the judge shall direct the sheriff to summon from the body of the county, a sufficient number of persons having the qualifications of jurors as provided by this act to fill the panel." In Pennsylvania, the original selection of the names of those who are to be placed in the wheel from which the jury are at the proper time to be drawn, is intrusted to the sheriff and at least two of the county commissioners. The mode of selecting and summoning the grand jury is provided by statute in most if not all of the States. In England and some of the States in this country, twenty-four men are summoned, but not more than twenty-three can be impanelled, as otherwise a complete jury of twelve might find a bill, when at the same time a complete jury of twelve might dissent. In the case of *Rex* v. *Marsh*, 6 Ad. and El. 236, it was held, that a grand jury must not consist of more than twenty-three men, and the same doctrine is maintained in the case of *The People* v. *Thurston*, 5 Cal. 69, and the statutes of most of the States provide that a full grand jury shall consist of twenty-three men. Irregularities in selecting and impanelling the grand jury which do not relate to the incompetency of individual persons, can in general, only be objected to by challenge to the array. In the case of *Vanhook* v. *The State*, 12 Texas, 268, after a very full review of the authorities the court say: "The better opinion to be deduced from the authorities to which we have access, seems to be that irregularities in selecting and impanelling the grand jury which

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do not relate to competency of individual jurors, can in general, only be objected by a challenge to the array; but that the incompetency, or the want of the requisite qualifications of the jurors may be pleaded in abatement to the indictment. And this doctrine and distinction seems founded on principle. It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right in the first place to have the accusation passed upon, before he can be called upon to answer to the charge of crime by a grand jury composed of good and lawful men. If the jury be not composed of such men as possess the requisite qualifications he ought not to be put upon his trial upon a charge preferred by them, but should be permitted to plead their incompetency to prefer the charge and put him upon his trial in avoidance of the indictment, otherwise he may be compelled to answer to a criminal charge preferred by men who are infamous, or unworthy to be his accusers. And it may be that he will not have an opportunity afforded to question their competency before the finding of the indictment, for the accused is not supposed to he present when the grand jurors are impanelled; he may not have been the subject of complaint or of suspicion, and if he could not plead to the indictment in such a case the incompetency of his accusers, the right to have the accusation preferred by good and lawful men might be virtually denied him. It is for the purpose therefore of securing to the accused a substantial right, affecting it may be, his character and good name if not his personal security, that he is allowed to plead in abatement or in avoidance of the charge, the incompetency of the persons by whom it was preferred. But if the jurors who preferred the charge are good and lawful men, unexceptionable as respects qualifications, it can be of no consequence to the accused in what manner they were selected or how impanelled, while it may be of the utmost consequence to the public that the administration of justice be not delayed or defeated, by mere technical objections to the regularity of the proceeding of those who are appointed for the purpose of properly distributing and equalizing the burdens of the jury service. It is in these considerations which have respect to the rights of the

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citizen on the one hand and public convenience on the other, that the rules of law on this subject are founded. And while they subserve the interest of the public, they can in no degree affect injuriously any rights of the accused." In the case of *Stone* v. *The People*, 2 Scam. Ill., 326, it was held, that objections to the mode of summoning a grand jury should be taken by a challenge to the array, or by motion to quash the indictment founded on affidavit of some irregularity, and that the objection could not be taken on a motion for new trial.

After the grand jury is assembled, any person entitled to challenge may, when the court is prepared to impanel the grand jury, challenge any one or more of the grand jury so selected and summoned, for good cause shown. Hawkins says: "It seems clear that by the common law every indictment must be found by twelve men at the least, every one of whom ought to be of the same county, and returned by the sheriff or other proper officer, without the nomination of any other person whatsoever, and ought also to be a freeman and a lawful liege subject, and consequently neither under an attainder of any treason or felony, nor a villein, nor alien, nor outlawed, whether for a criminal or as some say a personal action."

To the common law qualification of grand jurors, the English and American statutes have made several additional qualifications necessary and requisite to the competency of a grand juror. Chitty, in his work on Criminal Law, vol. 1, p. 251, says: "It is perfectly clear that all persons serving upon the grand inquest must be good and lawful men, by which it is intended that they must be liege subjects of the king, and neither aliens nor persons outlawed, even in a civil action attainted of any treason or felony, or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous. And if a man who lies under any one of these disqualifications be returned he may be challenged by the prisoner before the bill is presented; or, if it be discovered after the finding of the indictment, the defendant may plead it in avoidance, and answer over to the felony, for which last purpose he may be allowed the assistance of counsel on producing in court the record of the outlawry, attainder or conviction on which the incompetency of

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the juryman rests. This necessity for the grand inquest to consist of men free from all objections, existed at the common law and was affirmed by the statute of 11 Hen. 4th, c. 9, which enacts that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect whatsoever, so that if a man be outlawed upon such a finding, he may, on evidence that one of the jury was incompetent, procure the outlawry against him to be reversed. It is clear that a defendant, before issue joined, may plead the objection in evidence; but if he takes no such exception before his trial, it seems doubtful how far he can afterwards take advantage of it, except it can be verified by the record of the court in which the indictment is depending, as in case of an outlawry of one of the indictors in the same court, in which case any one as *amicus curiæ* may inform the court of the objection." It is believed that there is no statute, or sanctioned practice in this country, authorizing a prisoner to peremptorily challenge grand jurors, and it is believed no such practice exists in England. Chitty refers to Hawkins' pleas of the crown, where it is said that a challenge to grand jurors is very properly limited to persons who are at the time under a prosecution for an offense about to be submitted to a grand jury. By these authorities it is clear, that in England, these challenges are limited to one certain class of cases, and these only for cause. In the case of *Jones* v. *The State*, 2 Blackf. Ind., 475, it was held, that a person under a prosecution for a capital offense about to be submitted to a grand jury, may challenge any of the grand jurors for cause, but not peremptorily. In the case of *Brown* v. *Com. Mo. West Jurst.*, 212, the supreme court of Pennsylvania held, that there was no error in the court below refusing to permit the grand jurors to be polled on their *voir dire* before the submission of the bill of indictment. But however numerous the grand jury may be, it seems that if one of them be open to exception, he vitiates the whole action of the grand jury, since it cannot be assumed that he was not one of the twelve that united in finding the indictment. *Barney* v. *The State*, 12 S. and M., 68; *State* v. *Duncan*, 7 Yerger, 271; *State* v. *Rockafellow*, 1 Halst., 332; *State* v. *Roche*, 5 Halst., 83; *State* v. *Jacobs*, 6 Texas, 197. But when the chal-

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lenge goes to the manner of drawing or selecting the jury the objection should be taken by challenge to the array. In the case of *Jones* v. *The State*, 2 Blackf. 475, *supra*, the court say that, "A grand jury is the great inquest between the government and the citizen, an institution that should be preserved in its purity, and no person should ever be permitted to take a seat as a member thereof, except such good and lawful men as will impartially and faithfully carry the objects of the institution into effect." One of the grand jury in this case in answer to a question put to him by the prosecutor said, "that he thought he could not in his conscience find any man guilty of an offense that would subject him to death." The juror for that cause was set aside by the circuit court, to which the defendant objected, and the court say: "It was a general question on an abstract principle, and therefore under the circumstances of the case, might be properly asked. The object in these cases is not to procure a jury that will acquit the guilty or convict the innocent, but to select such men as will impartially hear and examine, and acquit the innocent and convict the guilty." This question arose in the case of *Musick* v. *The People*, in the 40th Ill., p. 268. The record in this case disclosed the fact that the plaintiff in error, defendant below, had been recognized for his appearance at the circuit court, and was in attendance according to the exigencies of his recognizance. That on the opening of the court on the morning of the fifth day of the term to which the recognizance was returnable, Musick, by his attorney, entered a motion to have the grand jury brought to the bar of the court for the purpose of having it purged of members who it was alleged had before the hearing of the evidence, expressed the opinion that he was guilty of the charge made against him. That the attention of the court was afterwards called to the motion, but being otherwise engaged it was not then taken up, and before a hearing was had the grand jury came into court for the purpose of making presentments, and after they were polled the motion was again called up, and after arguments were heard, the court inquired of the foreman whether the grand jury had acted in the case, and was informed they had and were ready to report a bill; and thereupon the court overruled the motion, to which

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exceptions were taken. The court, per Walker, C. J., say: "Our statute has made no provision in regard to the time, manner, or causes for which grand jurors may be challenged. In this respect the practice obtains as it was at common law. We have therefore to look to that source for the rules governing such cases. By a reference to authorities it will be seen that this question has been seldom presented to courts for determination. But the authorities all agree that grand jurors may be challenged for cause, as well as petit jurors. The practice is, that if the party waives the right to challenge the array, or if no cause exists for such challenge, any person charged with crime, and which is likely to come before that body for action, has the right to challenge any person returned as a grand juror for any sufficient cause. But the time when this right must be exercised is not quite so well settled. A careful examination of the adjudged cases, and the general rules of practice applicable to the challenge, does not seem to remove all difficulty in determining this question. At the common law the practice seems to be that if a disqualified person was returned as a grand juror, as if he were an alien, a villein, or one convicted of crime, any person under prosecution in the court before he is indicted, may challenge such persons, or other persons returned at the request of the prosecution, or other persons not returned by the proper officers. 2 Hawk. Pl., c. 295, ch. 25, sec. 16; 3 Bac. Abr. 725, Tit. Juries A. 2 Burns' Inst. 694. But we have not been able to find that the courts of Great Britain have ever allowed the expression of the opinion by a grand juror that the prisoner was guilty to be ground of challenge. But in this country the current of authorities seems to be in favor of allowing it to be sufficient ground of challenge. In New York, previous to the statute on the subject, such was allowed to be a good exception before indictment found. *People* v. *Jewett*, 3 Wend. 314. And the same was held in Pennsylvania, *Commonwealth* v. *Clark*, 2 Brown, 235. And in Indiana it was held that exceptions may be taken to the qualification of a grand juror at any time before the indictment is formed. *Jones* v. *The State*, 2 Blackf. 477. But in Massachusetts, in the case of *Commonwealth* v. *Tucker*, 8 Mass. 286, it was held, that it was not cause of challenge to a

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grand juror that he had originated the prosecution. In this case the objection was taken before the juror was sworn, but it was disallowed, and the juror sworn. In Alabama, in the case of *The State* v. *Clarrissa*, 11 Ala. 57, it was held that the grand jury cannot be required to expurgate themselves of any supposed interest or bias, at the instance of one in jail expecting to be indicted; but it was there held that the objection must be taken by plea in abatement to the indictment.

When it is remembered that under our practice, an indictment may be preferred on the information of any two members of the grand jury, without being sworn as witnesses, or on the oath of one only, we cannot see how they can be challenged for having formed and expressed an opinion of the prisoner's guilt. If that could be done, then, under our practice the accused could, by challenge of such jurors, prevent a finding in that mode, as the jurors having knowledge of facts sufficient to warrant an indictment would certainly entertain the belief of his guilt. We are rather inclined to the opinion that this forms no ground of challenge to a grand juror; but if it does, the ojection should be taken, as in the case of a petit juror before he has taken the oath. *State* v. *Rickey*, 5 Halsted, 83. Otherwise great inconvenience and delay, if not an obstruction to the administration of justice might ensue.

And such was the rule adopted in the trial of Colonel Burr, but the exception in that case, was to the manner in which the jury had been selected, and illustrates the practice in such proceedings." In the case of *Gross* v. *The State*, 2 Carter, Ind. 329, it was held, that a grand juror who has expressed an opinion as to the guilt of the prisoner whose case is to be investigated, is incompetent. The true rule would seem to be, that parties under prosecution should have the right at the time the grand juror is sworn to object, and that unless objection is made before the juror is sworn, he should be held to have waived his right to object to the grand jury on the ground of prejudice.

In the matter of the oath to be taken by jurors in the Federal courts under the act of June 17th, 1862, reported in 35 Georgia, p. 366, Erskine J., held that grand jurors may for cause, be challenged by a person at large, who had been notified by the

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prosecutor that he would be made the subject of an indictment for perjury during the term.

Under the statute of Maryland, providing that the four judges, or any two of them, forming a quorum, shall meet in the city of Baltimore, and then "select" the "names" of a certain number of persons to serve as grand jurors and petit jurors in such city, the deputy clerk made the selection from the list of names, which selection was approved and adopted by the judges separately and without consultation with each other, and there was no meeting for consultation before, or approval after the selection was made, it was held that such a selection was not a compliance with the law, and that an indictment found by a grand jury so selected, was not found by a legally constituted grand jury, and that an indictment found by them was null and void, and should have been quashed, and the prisoner indicted *denovo*. In this case it was also held that the prisoner could take advantage of the objection to the mode of selecting the jury by plea in abatement after indictment found. But it seems to us, the better rule is to hold that the party indicted can only take advantage of the mode of selecting the jury, if they were otherwise competent, by a challenge to the array, and such seems to be the weight of authority.

In Mississippi, it is provided by statute, that "no objection shall be raised by plea or otherwise to the grand jury, but the impanelling of the grand jury shall be conclusive evidence of its competency and qualifications. Code 499, art. 131. But parties interested may challenge or except to the panel for "fraud." It is too late after indictment found, to call in question its competency and qualifications, by plea in abatement. *Lee* v. *The State*, 45 Ala. 114; *Head* v. *The State*, 44 Ala. 731; *Durrah* v. *The State*, 44 Ala. 789; and where the record shows the organization of a grand iury under the supervision of the court, and it does not affirmatively appear to the contrary, it will be presumed that the grand jury was duly and legally organized. *Chase* v. *The State*, 46 Ala. 683. And where the record shows that the grand jury were duly elected, impanelled, sworn and charged, is sufficient; the presumption is that they were good and lawful men. *Galvin* v. *State*, 6 Caldw. (Tenn.) 283.

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In Iowa the competency of grand jurors is tried by the same rules as those of petit jurors. *The State* v. *Gillick*, 7 Iowa, 304, the court say: "The authorities are not numerous, as to what will constitute good cause of challenge to a grand juror. On the trial of Aaron Burr, C. J. Marshall, allowed a challenge to a grand juror for the same cause that would have constituted a good objection to a petit juror. 1 Burr's Trial, 38. Taking this as the rule, there can be no doubt that the challenge in this case should have been allowed." If it is true, that a party charged with crime, has the right to have his case passed upon by an impartial grand jury, before he shall be called upon to answer upon a charge of crime—and it seems that the history of the common law demonstrates the justice of this position—and by no other rule can the grand jury system command the respect of the profession or the people, and the Iowa court in the case of *The State* v. *Gillick*, *supra*, hold that the right of a party charged with an indictable offense to an impartial grand jury, is as unconditional as his right to any jury whatever. This case it will be noticed is not in harmony with the case of *Musick* v. *The People*, *supra*, and would not be regarded as good law in Illinois. Hence the true rules deducible from the authorities are: 1st. That all objections to the selection and summoning of the grand jury should be taken advantage of by a challenge to the array. 2d. That all obiections to the competency of the grand jury, must be made before the grand jury are sworn. 3d. Only such persons as are under prosecution are entitled to object. 4th. That all irregularities, apparent of record, may be taken advantage of by motion to quash. 5th. That all matters going to the disqualification of grand jurors must be taken advantage of by plea in abatement. While there is some little conflict in the authorities upon questions of practice, yet the weight of authorities would seem to bear out the above rules. The plea of not guilty waives all objections that can be taken advantage of, under any one of the rules here indicated; however there is a class of cases where the prisoner has been allowed to withdraw his plea of not guilty for the purpose of taking advantage of objections under the rules above indicated. The allowance of the withdrawal of the plea of not guilty for such

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purpose would seem to be in the discretion of the court. By law no grand juror or officer of the court, or other person should make any disclosures as to the business transacted by the grand jury. Ill. § 10 Division, 11 Crim. Code, Ill., which is but a reaffirmance of the common law.

Supreme Court of the United States.

[OCTOBER TERM, 1873.[

SUBSCRIPTION TO STOCK OF CORPORATION—EFFECT OF CONSOLIDATION.

NUGENT *v.* SUPERVISORS OF PUTNAM COUNTY.

A material change in the character of a railroad company will have the effect of releasing a subscription to its stock. But the change must be something that was not authorized at the time the subscription was made.

A subscription was made by a county to a railroad which was consolidated with another railroad, the charter of the company to which the subscription was made permitting the consolidatlon. It was held that the subscription was not released by the consolidation.

The opinion sets forth the facts.

Mr. Justice STRONG delivered the opinion of the court.

We think the Circuit Court erred in sustaining the demurrer to the plaintiff's replication. The bonds, to which the coupons in suit were attached, purport to have been made and issued by the order of the board of supervisors of Putnam county, in payment of the county's subscription to the capital stock of the Kankakee and Illinois River Railroad Company. They are made payable to that company or bearer, and the plaintiff is a *bona fide* holder of the coupons, having paid value for them without notice of any defense. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain. The material facts relating to their issue, as gathered from the pleadings, may be concisely stated as follows: The Kankakee and Illinois River Railroad Company, was a corporation existing in Illinois under a special charter, and it was authorized to construct and maintain a railroad from the eastern line of the State to Bureau Junc-

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tion. It had liberty to increase its stock to such an amount as might be necessary to complete its road. At the same time the county of Putnam was empowered, by a general law of the State, to subscribe for the stock of the company, and to issue its bonds in payment of its subscription. In attempting to exercise the power thus conferred, the board of supervisors of the county, on the 4th day of June, 1869, ordered an election to be held, to determine whether the county should subscribe for stock of the railroad company, to the amount of $75,000, to be paid for with the bonds of the county, provided the railroad should be so located and constructed through or within one half mile of the town of Hennepin. The election was held, and it resulted in favor of the subscription. On the 4th day of January, 1870, another election was ordered, to determiue whether the county would subscribe for $25,000 more of the stock, to be paid in the same manner, and with a similar provision respecting the location of the road. This subscription was also sanctioned by the popular vote. On the 24th day of September, 1869, the railroad company accepted the $75,000 subscription, and on the 27th of October next following, gave notice of the acceptance to the board of supervisors of the county. The notice was put upon record, and on the same day the board of supervisors adopted a resolution that the subscription was thereby made for the building of the railroad, and directed the clerk of the county court to execute and deliver the bonds on behalf of the county. This resolution also declared that the bonds should be issued on the written order of a committee appointed to protect the interest of the county; that they should not be issued until the railroad company should have made a *bona fide* contract with responsible parties for laying the iron and operating the road through the county, as specified in a previous order of the board. On the 15th day of March, 1870, the second subscription for $25,000 was made in a similar manner, and with like directions.

That thus the county became, in effect, a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial. In *The Justices of Clark County* v. *The*

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Paris, Kentucky River & Winchester Turnpike Co., 11 Kentucky Rep. (B. Monr.) 143, it was ruled that an order of the county court, by which it was said that it subscribed for a specified number of shares of road stock, was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution, declaring the subscription made, but there was an acceptance by the railroad company, and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made; and had nothing subsequently occurred to change their relations, the county could have enforced the delivery of the stock, and the company could have compelled the delivery to itself of the bonds, on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied that all the prescribed conditions precedent to their delivery had been complied with, and they so decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds, and of their accompanying coupons, in the hands of a *bona fide* holder for value, would be beyond doubt.

The circuit court, however, was of opinion, and so decided, that the bonds are invalid, because before their delivery the Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee and Pacific Railroad Company, another corporation. The facts of this part of the case, as set forth in the pleadings, are as follows: On the 12th of January, 1870, a company was organized under the laws of Indiana, for the purpose of building a railroad from Plymouth, Indiana, to the east line of the State of Illinois, at some point to be selected in the direction of Momence and Kankakee, with a view to connection with some railroad leading westward. Its corporate name was the Plymouth, Kankakee and Pacific Railroad Company. With this corporation, on the 21st day of October, 1870, the Kankakee and Illinois River Railroad Company

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became consolidated, taking the name of the former. The consolidation was authorized by the general laws of the two states, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was, that the consolidated company succeeded to all rights, property, and privileges which belonged to each of the two companies out of which it was formed, before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee and Illinois River Railroad Company and give its bonds in payment? Or, did it render unauthorized the subsequent delivery of the bonds, and make them invalid even in the hands of a *bona fide* purchaser? These are the only questions presented by the record that need discussion.

It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligations to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the State, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organ-

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ized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. The act further declared that the consolidated company should have all the powers, franchises, and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained, in its 11th section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed, or that might thereafter be constructed within the State, or any other state, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was, therefore, contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State, and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed, other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and consequently the rule is inapplicable.

In a multitude of cases decided in England and in this country, it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay

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for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In the *Cork & Youghal Railway Company* v. *Patterson*, 37 Eng. Law. & Eq. 398, which was an action to recover a call of one pound per share on one hundred shares subscribed, it appears that the defendant was one of the subscribers to the agreement for the Cork, Middleton & Youghal Railroad Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscriber's agreement for the Cork & Waterford Railroad Company contained similar provisions. After the defendant's subscription was made, the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first named company. Upon this state of facts all the judges held that he remained liable on his subscription. Its effect was said by Chief Justice Jervis, to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that; and therefore, added the judge, by signing the Cork & Youghal he afforded an authority to the directors to apply his signature to the Cork & Waterford, and so make him a subscriber to that. To the same effect are the cases of *Nixon* v. *Brownlow*, and *Nixon* v. *Green*, 3 Hurl. & Norman, 686. The American authorities are equally explicit. They uniformly assert that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental *and not provided for or contemptated, by either the charter itself or the general laws of the State.* In *Sparrow* v. *The Evansville & Crawford Railroad Company*, 7 Porter, Ind. 369, where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held

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liable to the consolidated company for his subscription, and this, though the consolidation took place without his knowledge or consent. The same doctrine was asserted in *Bish* v. *Johnson*, 21 Ind. 299. See also *Hanna* v. *Cincinnati, &c. R. R. Co.*, 20 Ind. 30. The supreme court of Connecticut recognized the rule in *Bishop* v. *Brainard*, 28 Conn. 289, and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation. Vide also, *Schenectady & Saratoga Plank-road Co.* v. *Thatcher*, 1 Kernan, 102; *Buffalo & N. Y. City R. R. Co.* v. *Dudley*, 4 Kernan, 336; *Meadow Dam Co.* v. *Gray*, 30 Maine, 547; *Agricultural Branch R. R. Co.* v. *Winchester*, 13 Allen, 29; *Noyes* v. *Spaulding*, 27 Vt. 420; *Pacific R. R. Co.* v. *Renshaw*, 18 Mo. 210; *Fry's Executors* v. *Lexington, &c. R. R. Co.* 2 Met. Ky. 314; *Illinois River R. R. Co.* v. *Beers*, 27 Ill. 185; *Terre Haute & Alton R. R. Co.* v. *Earp*, 21 Ill. 292.

Many other citations are at hand, but these are sufficient. No well considered cases are in conflict with them. *Marsh* v. *Fulton County*, 10 Wall. 676, is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi & Wabash R. R. Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made, and made not for the stock of the Mississippi & Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made; that it had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the or-

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ganization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the State, and nothing in the charter which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law intrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in *Marsh* v. *Fulton County*, therefore, does not touch this case. Nor was there anything decided in *Clearwater* v. *Meredith*, 1 Wall. 25, which sustains in any degree the defense set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam county, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company, or bearer, but before they were delivered, the company became consolidated with another, in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bona fide* holder of some of the coupons for value paid. It would, we think, be a reproach to

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the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee & Illinois River Railroad Company, or bearer. Proposing to buy, he had only to inquire whether the county was, by law authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to inquire farther, and had he inquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him.

The judgment of the court is reversed, and the cause is remitted, with instructions to overrule the defendant's demurrer.

The principal case holds that a party proposing to purchase municipal bonds, has only to inquire, whether or not, the corporation issuing the bonds was authorized by law to issue them, and whether their issue had been approved by a popular vote. This same question in a different form has undergone consideration by the United States circuit court in Missouri, and it was there held, that although the decisions of the State courts expounding the effect of the State constitutions and laws upon securities issued by a municipal corporation, are not necessarily conclusive upon the Federal courts, yet they will be followed unless cogent reasons appear to the contrary; and the decision of the supreme court, of *The State of Missouri ex. rel., &c.* v. *Sullivan County*, 51 Mo. 522; *Smith* v. *Clark County*, 54 Mo. 58; 1 Cent. Law Journal, page 5, and *State* v. *Green County*, Jan. term 1874, which hold that a provision in the charter of a railway company granted by act of the legislature, authorizing and empowering counties through which the road shall pass, to subscribe for its stock and issue their bonds in payment of the same, is a privilege of the railway company, which is not taken away by a subsequent constitutional ordinance, approved and followed. It was consequently held, that the charter of the Alexandria and Bloomfield Railroad Company, gave the county courts of the counties through which the road should pass, power to subscribe to its stock, and issue their bonds in payment of the same, *without a vote of the people.* Subsequently the company was empowered to change its name and extend its line, and its name was accordingly changed. Subsequently authority was given this company to consolidate with an Iowa company whose *road* intersected it on the boundary line between the two states, and the consolidation was consequently effected, and the consolidated company took a new name. After this consolidation the defendant counties issued their bonds to the consolidated company by name, reciting on the face of the bonds the provision in the charter of the original Alexandria and Bloomfield R. R. Co., as their authority to do so; and also reciting on the face of the bonds, the subsequent change of

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name of that company, and the final consolidation and change of name.

It was held upon the authority of the principal case, that the authority to issue these bonds was complete. *Thomas* v. *County of Scotland*, and *Same* v. *County of Schuyler*. The case of —— v. *Bates County*, U. S. circuit court, Western Dist. Mo. Distinguished from these cases Forum Law Review, 425–6, in the case of the *Town of Reading* v. *Willis* et. als., Sept. term, 1872, supreme court of Illinois; was a bill to enjoin the county treasurer of Livingston county, from paying out money in his hands, which had been collected for interest on the fifty thousand dollars of bonds issued by the township of Reading, and delivered to the Chicago, Pekin and South-western Railroad Co., for that amount of their capital stock. The court say: "It appears that an election was called, a vote was had resulting in a majority in favor of subscription for $50,000 of the stock of the company to be paid for in the corporate bonds of the town, and the amount was regularly subscribed, the certificate of stock delivered to the town, and the bonds issued to the company.

The bill is against the treasurer and the unknown holders of fifty thousand dollars of bonds issued by the late supervisor of said town, J. S. R Overholt. It is insisted that the conditions upon which the bonds were issued had not been accepted by the company; that the subscription was voted to the Chicago and Plainfield Railroad Co., and delivered to the Chicago, Pekin and South-western Railroad Co. Upon an examination of the various enactments in reference to this company, it appears that the general assembly at its session in 1859, incorporated the first named road giving it the usual power to construct and operate a railroad between the points named; afterwards, at the session of 1867, an act was adopted to amend the charter. At the session of 1869, there was an act adopted further amending the charter. It changes the name of the road to that of the Chicago, Plainfield and Pekin Railroad Co., and confirms their former rights and confers new ones; and authorizes the company to extend the road to the city of Pekin. This last act declares that all subscriptions and donations to the act are legalized, and declares all elections hitherto, to vote subscriptions to the road, valid. There was another act adopted at the last session, changing the name of the company to that of the Chicago, Pekin and South-western Railroad Co.

The act of Feb. 20, 1867, private laws, vol. 3, p. 786, amends the charter of the Chicago and Plainfield Railroad Co., and authorized the company to extend their road from a point on the south line of Kendall county into the county of Peoria. Now this road with its charter thus amended, the vote to subscribe and issue the bonds was taken. The law authorizing the vote, was the act of March 6, 1867, and authorizes the counties of Woodford, La Salle and Livingston, and the townships and cities, incorporated towns and corporations in those counties, to become subscribers to the capital stock of any railroad there, or that might thereafter become incorporated in this State. The further point was made in the case, that the town of Reading had no power to subscribe, for the reason that the company could not, under their charter, as amended, run their road into or through the town of Reading, for the reason that the company would be compelled to deviate from the line specified in the charter.

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The court hold that the road could be constructed through the town under the charter without deviating from the line specified in the charter. The court then say: "But it is urged that the vote was to take stock in the Chicago and Plainfield Railroad Co., and that the bonds were issued to the Chicago, Pekin and South-western Railroad Co. We have seen that the act of 1869 amended the charter and changed the name of the road. It was not a fundamental change, on the contrary, it was the same road with a different name, with the right to change its location so as to run to Pekin; at most, but three or four miles from the south-west corner of Peoria county. The general purpose and direction of the road was the same, the stockholders, directors and officers the same, and we may safely infer that the amendments to the charter were accepted, as the bonds seem to have been made payable to the company by that name. Nor has counsel for appellants pointed out in what manner the company as now organized differs in any particular, beyond slight amendments, from the company as at first organized. The mere change of name does not and cannot change things or their properties. Nor does the change of the name of a thing imply any such change of properties." The above doctrine was reaffirmed in the case of *Bently* et. als. v. *The Town of Minonk*, Jan. term, 1873. The circuit court of the United States for the District of Nebraska, in the case of *The Union Pacific Railroad Co.* v. *Merrick:* "Held 1st. The issue of bonds by a county will not be restrained where the requirements of the law authorizing the issuance of the bonds have been complied with. 2d. A vote by a county to issue bonds to a given railroad company whose line runs to its county seat, is not rendered invalid by a condition that a depot of a company should be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free wagon bridge. In the case of *Rogers* v. *The Town of Bloomington*, in the circuit court of the United States for the Southern District of Illinois, which was an action on the coupons attached to the bonds of the town, issued in payment for subscription to the capital stock of the La Fayette, Bloomington and Mississippi Railway Company, the court, per Drummond, J. said: "When, under certain circumstances it is conceded, as in the case here, that a corporation or municipality has the power to issue bonds, then, when such bonds or coupons attached, are in the hands of innocent persons who have paid value for them, the question is, whether it is competent for the municipality to set up that those conditions have not been complied with. In most of these cases it is declared that in order to enforce the issuing of these bonds there must be an application made to the municipality by the voters, and it is only when that is done that the municipality had a right to issue the bonds. When such application is made, the proper number of voters is a precedent to the issuing of the bonds. The power to determine whether the application has been made in the proper way, and by the proper number of voters, rests with the municipality or its agents; and when they have acted, although it is a condition precedent to the issuing of the bonds, the municipality cannot say that it has acted without authority, without this particular condition having been complied with. This rule

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runs through all the authorities. Now, as we understand, the objection is made here, that one of the conditions upon which these bonds were to issue, was that they should not be issued except upon a certain amount of work being done upon the road. It is conceded by the defense, that if the facts are peculiarly within the cognizance of the parties, that other persons, innocent purchasers are not bound to inquire into the existence of these facts. How is it here. Now whether or not the application was made by a proper number of voters, is a matter of public notoriety, and ought to be a matter of record. Yet, as we say it is not necessary for a *bona fide* purchaser of a bond or coupon, to inquire into that, and go behind the bond to ascertain whether this condition has been complied with or not. Why should there be in such case as this, any greater necessity for inquiring as to how much work has been done. Must the purchaser go upon the road and ascertain whether the ties have been laid down, and the road put in running order, when the law declares that the bonds shall not be issued except those facts exist when the bonds have been issued by the agents of the municipality? Why is a party any more obliged in that case than in the other, to ascertain the facts?

Although this case shows that the business was somewhat loosely done, and that certain facts are not spread upon the record as they should have been, yet that fact would not make it necessary to go and ascertain whether every contingency had occurred, precedent to the issuing of the bonds. The law presumes that the agents of a public corporation will act in conformity with the law, and the corporation must endorse the acts of its agent. These agents have done what the law authorized to be be done, and issued the bonds. The bonds bear on their face the fact that they were issued in conformity with the law, and when an innocent purchaser looks upon them in the market and buys them with this evidence of legality upon their face. it is not competent for the municipality to turn round and say that its agents did not act as they ought to have done, that they did not comply with certain conditions with which they were required to comply.

This is a rule of universal application, which has been repeatedly settled by the decisions of the supreme court of the United States, and have been uniformly acted on for a series of years. It would be reversing all the rules that have existed a long time, to say that it is competent now for the town of Bloomington to come in and say, that "our agents have issued these bonds before they were authorized to issue them." When the bonds were issued the town of Bloomington took the responsibility of the acts of its agents. and outside parties dealing with bonds in the market were not obliged to look into the hidden things which were done or not done by the agents of the municipality. It is for these reasons, as we understand them, that the plaintiffs are authorized to recover in these cases."

The rights of third parties in respect to municipal bonds is of great practical importance. Municipal bonds are governed by the law merchant. The incidental questions which arise are necessarily not entirely similar, inasmuch as in one a political division is a party, but these incidents do not affect the recognized fact, that in respect to their obligations, municipal corporations are in the eye of the law artifi-

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cial persons, which are held to substantially all the responsibilities that are entailed upon individuals or private corporate bodies. The great fundamental truth on which these privileges rest is, that a municipal corporation when it assumes to contract with private parties, takes upon itself all the legal liabilities of a private corporation. It is when it enters the markets of the world, in no sense a political division, but purely and solely a private person. Hence it must be answerable to those rules which the commercial world has prescribed, and which the courts have reduced to an inflexible code, from which nothing but the most extreme consideration can induce them to depart. *Baily* v. *Mayor of N. Y.*, 3d Hill, 531; *Lloyd v. Mayor of N. Y.*, 5 N. Y., 369; *Detroit* v. *Casey*, 9 Mich., 165; *Storis* v. *Utica*, 17 N. Y., 104; *Com'r of Knox Co.* v. *Aspinwall*, 21 How., 540.

The case of Aspinwall was an action upon coupons issued for subscription to a railroad, and the grounds of defense were, that the act permitting the subscriptions, provided that the subscriptions should not be made except after an election properly held; that the election had not been so held; and that the act was a public act; the holders of the bonds were chargeable with notice of its requirements, and of the irregularity of the election. This defense was held untenable. The court held that the commissioners were the proper parties to decide as to the regularity of the election, and that their having subscribed to the stock and issued the bonds that purported, on their face to have been issued in pursuance of law, a *bona fide* holder was clearly protected. This case was followed down to the principal case. See *Bissel* v. *Jeffersonville*, 24 How., 287; *Gelpeke* v. *Dubuque*, 1 Wall, 175; *Vanhostros* v. *Madison City*, 1 Wall, 297; *Murray* v. *Lardner*, 2 Wall, 110; *Rogers* v. *Burlington*, 3 Wall, 654; *Supervisors* v. *Schenck*, 5 Wall, 783; *Lee Co.* v. *Rogers*, 7 Wall, 183. As held in the principal case, the purchaser of a municipal bond is put on inquiry as to three points:

1st. As to whether there has ever been authority of law by which the bond has been issued.

2d. As to whether the bond has been issued by the proper officials and within the scope of their authority.

3d. Has their issue been approved by a popular vote, in cases where the law requires such vote; and if so, was the election called by the proper officer authorized by the law to call the election.

Having ascertained as to these points, he is bound to go no further if the face of the bond shows that it is valid. If the purchaser fails to make these inquiries, and there be no law authorizing the issuing of the bonds, or if the bond is issued by an officer not authorized to issue the bond, it is void under all circumstances. *Marsh* v. *Fulton Co.*, 10 Wall, 676; *Clark* v. *City of Davenport*, 14 Iowa, 494; *Booth* v. *Woodbury*, 32 Comn., 118; *Hooper* v. *Emery*, 14 Maine, 375; *Exparte Burnett*, 30 Ala., 461; *Floyd Acceptances*, 7 Wall, 666.

The election must be held in conformity to the law authorizing the same, and must have been called by the proper officer, and where the election is called by the wrong authority, that the bonds issued in pursuance of such an election will be void in the hands of innocent holders. *Force & Co.* v. *Town of Batavia*, 61 Ill., 99, and authorities there cited.

But in examination of the question

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by the purchaser, of the law authorizing the issuance of the bond, he must determine also, the constitutionality of the law, for the reason that the public are chargeable with notice of the provisions of the constitution as well as those that are of a statutory nature. A person proposing to buy municipal bonds is therefore only to inquire whether the municipality issuing the same, was by law authorized to issue them, and whether their issue has been approved by a popular vote at a legal election; and that they are signed by the proper officer authorized by law to execute and issue them. And in such case the purchaser takes the bonds, and the liability of the municipality is fixed, and no tax payer can obtain an injunction against a tax formally levied to pay the same. The only cases in which an injunction may properly issue, enjoining a tax levied to pay bonds or coupons, in the hands of *bona fide* holders, is to show by the bill that there was no law authorizing their issue, or that the law is unconstitutional, or that the issue of the same had not been approved by a popular vote. See Coler,' on Municipal Bonds, vol. 2, p. 127–40. In cases mentioned, the company to whom the bonds were issued, and the municipality as a stockholder, would be different, and for cases where the company may or may not compel the municipality to issue bonds. See Redfield on Railways. Also, *People ex. rel. G. C. & S. R. R. Co.* v. *Town of Santa Anna; Same* v. *Town of Harpe; Same* v. *Town of Leanna*, Jan. term, 1873. Also, *People ex. rel. P. L. & D R. R. Co.* v. *Board of Supervisors of Logan Co.*, Jan. term, 1872, supreme Court of Ill.

In the McLean Circuit Court.

JOHN T. MERRITT v. JAMES A. TARMAN, In Appeal.

A verdict of a jury before a Justice of the Peace in this form, "We the jury find for the plaintiff, fifteen dollars and costs," held to constitute a valid judgment without any further order of the magistrate.

Tipton, J.—The plaintiff in this case instituted this suit before Upton Comes, a justice of the peace in Gridley township, against the defendant. A trial was had, the jury returning a verdict in the following form:

"We the jury find for the plaintiff, fifteen dollars and costs."

No further proceeding was had before the magistrate, and the magistrate failed to render a judgment on the verdict. From this verdict the defendant appealed the cause to this court. The plaintiff by his counsel now enters his motion to dismiss the appeal, for the reason that the justice rendered no judgment from

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which the defendant was authorized by law to appeal. No authority was cited by either side. The novelty of the question caused an examination of the question by the court; and the result of the investigation leads me to the conclusion that the nature of a final adjudication in a justices court, is in no respect different from that of a court of record. Several causes uniting have produced rules of construction by which the records of the former courts are scrutinized with less severity than those of the latter. In the case of *Lynch* v. *Kelly*, 41 Cal. 231, it was held, that if on a jury trial before a justice of the peace, the jury find a verdict for a sum certain for the plaintiff, and the justice thereupon enters the verdict in his docket, but fails to enter up a judgment, it is an irregularity, but not such an one as renders a sale made upon an execution issued thereon void. As was said by the supreme court of the State of New York, in *Tilton* v. *Mulliner*, 2 Johnson's Rep. 181, "We are to overlook matters of form and to regard proceedings before justices of the peace according to the merits. Accordingly in that case a plea of a former judgment before a justice of the peace in favor of the defendant was held to be supported by proof of a verdict in his favor, upon which the justice of the peace ought to have rendered judgment, but had omitted to do so. In the case of *Gaines* v. *Betts*, 2 Douglas, (Michigan), 99, it appeared from the docket of the justice of the peace, that the case was submitted to the jury on proofs, and that the jury returned with a verdict for the plaintiff, for eighteen dollars damages and costs of suit. There was no further entry upon the docket, and no formal entry of judgment on the verdict. The Supreme Court say: "The verdict is itself the judgment of the law in the case, and the justice is simply required so to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause." This same doctrine is maintained in the case of *Iverall* v. *Pero*, 7 Mich., 316. "The justice of the peace might have been compelled to make the proper entry in his docket by judicial proceedings instituted against him for that purpose by the plaintiff, and it may be conceded that to issue an execution before judgment entered in form upon the verdict, would be bad practice, and that a timely

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motion by the defendant to set it aside for that reason should be supported. That would be so however, not because such execution would be void, but because it would be irregular merely. And a failure to make the objection would of course amount to a waiver of the irregularity, as was said by the supreme court of New York," in *Felton* v. *Mulliner*, *supra*, Freeman on Judgments, § 53. The failure of the justice of the peace to formally enter the judgment on the verdict, amounting simply to an irregularity that might be waived, and the defendant having regarded the same as a valid judgment and appealed from the same, thereby waived any right to complain on his part; and I am of the opinion that the plaintiff is not in a position to complain. Such negligence on the part of magistrates is not to be encouraged, a formal decision should be rendered by the magistrate. But for the reasons above given, I am of the opinion that the motion to dismiss the appeal should be denied.

MOTION DENIED.

Myers for plaintiff.
Rowell & Hamilton, for defendant.

Supreme Court of Illinois.

JOSEPH LOVENGUTH v. THE CITY OF BLOOMINGTON.

1. This was an action brought in the circuit court by Joseph Lovenguth against the city of Bloomington to recover damages for an injury received by a minor son, Emil, in passing over a sidewalk in the city.

2. It appears from the record that Emil Lovenguth at the time of the accident was eighteen years of age, he was working in the shop of the C. & A. R. R. Co., and in passing from the shop to his boarding place over a defective sidewalk, he stepped upon a loose board, fell and fractured a bone of his ankle. He was well acquainted with the sidewalk and knew it was in a bad and unsafe condition; had he so desired he could have gone over another sidewalk to his boarding place, which was entirely safe and secure, and the distance no greater.

3. Upon the evidence submitted it was a question of fact for the jury to determine, whether the accident occurred from the negligence and the want of proper care on the part of plaintiff's son, or from the neglect of the city to keep in repair the sidewalk in question. The jury found by their verdict that the

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injury received grew out of the negligence, and the want of proper care of the injured party.

4. The instructions given and refused, examined and held, that a party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have averted by the use of reasonable precaution.

5. The city having furnished a safe and secure sidewalk over which the plaintiff's son might have passed, affirming the case of *Centralia* v. *Krouse*.

6. To recover damages after the commencement of the suit, and for future damages, it must appear from the evidence that the injured party has not at the time recovered, and that the injury is permanent, and if not permanent at what time a cure could reasonably be anticipated.

O. T. Reeves and *E. M. Prince*, for the plaintiff in error.

I. J. Bloomfield, for the defendant in error.

The opinion of the court was delivered by

CRAIG, J.—This was an action brought in the circuit court of McLean county, by Joseph Lovenguth against the city of Bloomington, to recover damages for an injury received by a minor son, Emil, in passing over a sidewalk in the city.

The case was tried before a jury and a verdict returned in favor of the city. A motion was made for a new trial and overruled, and judgment rendered upon the verdict.

It is insisted that the court erred in overruling plaintiff's motion for a new trial, in giving instructions for defendant, and in refusing to give refused instructions one, two and three, for plaintiff.

It appears from the record, that Emil Lovenguth at the time of the accident was eighteen years of age; he was working in the shops of the Chicago and Alton Railroad Company, and in passing from the shop to his boarding place over a defective sidewalk he stepped upon a loose board, fell and fractured a bone of his ankle; he was well acquainted with the sidewalk and knew it was in a bad and unsafe condition; had he so desired he could have gone over another sidewalk to his boarding place, which was entirely safe and secure and the distance no greater.

On the trial the defendant called one Kern as a witness, and he testified, after the accident he went to see Emil, "he said when he was hurt he was going in a hurry, was walking fast." Also, one Steere who testified, "that he went with Mr. Kern to

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see Emil in the spring of 1872, Kern asked him if he was on the run, he said he didn't know exactly; and I asked him if it wasn't a hop and a skip, and he said yes. He said the accident happened by his attempting to step, jump or skip across a place where some planks were out, and caught his foot upon the edge of a board and it not being nailed fast tipped and slipped back."

Upon the evidence submitted, it was a question for the jury to determine, whether the accident occurred from the negligence and the want of proper care on the part of the plaintiff's son, or from the neglect of the city to keep in repair a sidewalk.

The jury have found by their verdict that the injury received grew out of the negligence, and the want of proper care of the injured party; it was a question of fact purely, for their consideration, and we would not distrust the finding unless the preponderance of the evidence was clearly the other way, and we are not prepared to say such is the case.

It appears the injured party was familiar with this sidewalk and its defects; he knew it was dangerous; another sidewalk, in good repair and safe, was presented by the city, if he chose to pass over the dangerous walk, he should have done so in a careful and guarded manner; but this it appears he did not do, but in a hasty, reckless manner, went jumping from one board to another until he fell and received the injury, the jury could very reasonably conclude that he was responsible for the misfortune that overtook him.

We perceive no error in the instructions given on behalf of the defendant. No special objection is taken to them, except the 4th and 7th. It is claimed the 4th had no application to the case. We are not prepared to say that appellant is not correct on this position, we are somewhat at a loss to see what the instruction had to do with the case; but conceding this to be true, the instruction could do no harm, and as we can see no way in which appellant has been prejudiced by it, we cannot on that ground reverse; as to the 7th, we do not consider it liable to mislead, it contains a proposition of law, upon which there can be no dispute, the substance of which is, a party is bound to use care in proportion according to the dangerous character of the place.

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In regard to plaintiff's refused instructions: The 1st refused instruction had been substantially given by the court in plaintiff's fourth, and it was unnecessary to repeat it to the jury.

The second refused instruction is as follows: "The court instructs the jury, that if the jury believes from the evidence that Allin street was the nearest route from the shop where plaintiff's son worked, to his boarding house, then the plaintiff's son was not bound to travel another route. even though he knew that the sidewalk on Allin street was out of repair."

Had the court given this instruction as it was prepared, it would have been in effect telling the jury the plaintiff's son might properly pass over the sidewalk, however dangerous it might be, with full knowledge on his part of its dangerous character. This is not the law. *Centralia* v. *Krouse*, unreported. A party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have averted by the use of reasonable precaution.

The third refused instruction is as follows: "The court instructs the jury that they may give damages for the loss of service sustained by plaintiff, not only before action brought, but afterwards, down to the time when, as appears in evidence the disability may be expected to cease, but not exceeding the time when plaintiff's son becomes twenty-one years of age."

The jury found that plaintiff was not entitled to recover at all, and hence the refusal of the court to give this instruction has in nowise injured plaintiff's case. Aside from this, however, there is no evidence on which to base the instruction; it does not appear from the evidence, at what time a cure might be effected.

Perceiving no substantial error in the record, the judgment will be affirmed.

Judgment Affirmed.

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PRACTICE IN COURTS OF RECORD.

Section forty-one of the Practice Act, laws of 1872, p. 345, provides that, "In all cases, in any court of record of this State, if both parties shall agree, both matters of law and fact, may be tried by the court, and upon such trial either party may within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write "refused" or "held," as he shall be of opinion is the law, or modify the same to which either party may except, as to other opinions of the court."

Under this statute I apprehend the court is not absolutely bound to pass upon any given question, but may or may not do so as may seem to the court right and proper. The court is not bound to answer in case of a finding for the plaintiff, upon which count the court finds the issues for the plaintiff. If upon the record made, the judgment can be sustained upon any one of the counts in the plaintiff's declaration, he is entitled to the verdict. Neither does the statute authorize the court directly or indirectly, to place upon the record as to which count the court finds for the plaintiff. See *Chicago & Alton R. R. Co.* v. *Henderson*, Jan. term, 1873, section fifty-one of the same act, laws of 1872, p. 346, provides that, "The court in charging the jury shall only instruct as to the law of the case, and the court *may*, at the request of either party require the jury to render a special verdict upon any fact or facts in issue in the cause, which verdict should be entered of record, and proceedings had thereon as in other cases. When the special finding of the fact is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

The above statute was construed in the case of *Hileman* v. *The City of Bloomington*, Jan. term, 1874, and it was held that the submission of special questions calling for a special verdict from the jury, is in the discretion of the court. The statute is: "the court may, at the request of either party, require the jury to render a special verdict, &c." But when the court shall submit questions calling for a special verdict from the jury, the an-

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swers of the jury to all the questions, are to be construed together and unless the special finding of the jury, when taken and construed together, shall constitute a finding inconsistent with the general verdict, the general verdict must stand. *Chicago and Alton R. R. Co.* v. *Murray.* It is thought questions may in some cases be properly submitted to the jury, but in many cases the propounding of special questions tend to confound the jury. However, my experience is, that as a rule the jury first determine how they will find the general verdict, and then find the special verdict to fit the general verdict.

But with proper care on the part of the courts, I have no doubt that in many cases a special verdict may well be required. If the interrogations are properly stated to the jury, they readily grasp their meaning and purpose, and pass upon the questions intelligently.

NEGLIGENCE IN CROSSING A RAILROAD TRACK.

A drunken man driving across a railroad, with a train coming in full view, and notwithstanding the shouting of persons within ten or twelve steps from him, held guilty of greater negligence than the company. *Toledo P. & W. R. R. Co.* v. *Riley*, 47 Ill. 514. In the case of the *Chicago and Alton R. R. Co.* v. *Gretzner*, 46 Ill., 74, it was held that all persons crossing a railroad track are bound to know that such undertaking is dangerous, and must take all possible proper precautions to avoid accidents in so doing, or they cannot recover for injuries received while crossing.

In the *Albany Law Journal*, Sept. 19, 1874, I find that "In *Pennsylvania Railroad Company* v. *Beale*, 73 Penn. St. 504, the supreme court of Pennsylvania decided a question relative to injuries by railway trains at crossings. The approach to the railroad was extraordinarily dangerous, because the track could not be seen beyond the point of crossing. Deceased did not stop to listen before he attempted to cross the track and was killed by a passing locomotive. An action was brought against

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the company to recover for causing the death of plaintiff's decedent, and the judge left the question of contributory negligence to the jury. The court on appeal held, that deceased was guilty of negligence in not stopping before he attempted to cross, and decided that the case should not have been submitted to the jury. The supreme court of Pennsylvania have settled the rule in that State, that a failure to stop immediately before crossing a railroad track is negligence *per se*. *Pennsylvania Railroad Company* v. *Beale, supra; Hanover Railroad Company* v. *Coyle*, 55 Penn. St. 396; *North Pennsylvania Railroad Company* v. *Heilman*, 13 Wright. 60. In New York it is held to be the duty of the traveler to look both ways before crossing the track, and an omission to do so is negligence *per se*. *Havens* v. *Erie Railway Co.*, 41 N. Y. 295; *Grippen* v. *New York Central Railway*, 40 id. 34; *Nicholson* v. *Erie Railway Co.*, 41 id. 525. A similar rule prevails in Massachvsetts, *Allyn* v. *Boston & Albany Railway Co.*, 106 Mass. 77. See also on this subject, *Railway Company* v. *Whitton's Adm.*, 13 Wall. 270."

In the case of "*The Chicago & Burlington R. R. Co.* v. *Payne*, 59 Ill. 534, was an action against a railroad company to recover damages for injuries occasioned by the alleged negligence of the defendants servants, in the manner of running its trains; it appearing that the accident occurred at a road-crossing near a populous city, the injured party having been struck by a passing train while attempting to cross the railway track in a buggy. The crossing was of a dangerous character, which fact was known to the servants of defendant. The evidence also, tending to show that the servants of the defendant ran the train without the use of steam, upon a down grade, in a comparatively noiseless manner, and at a rapid rate of speed without sounding the whistle or ringing the bell after they passed the whistle post, eighty rods from the crossing, when they had every reason to suppose that persons would be passing over the track on the highway, without opportunity of seeing the approaching train, then these facts were sufficient to warrant the jury in inferring recklessness of life and limb on the part of such servants, and that they were actuated by general malice and criminal misconduct, or very gross negligence. It was also held, that in this

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State a railroad company is under the statutory duty in the construction of its road across a public highway, to restore the highway to its former state; or in a sufficient manner, not to impair its usefulness. And that, if a highway can be restored in a manner not to impair its usefulness, only by constructing the highway over the railway, it is the duty of the company to so restore it, and the omission is a breach of duty, and that it is not the duty of the highway authorities, but of the railway company to give such protection from peril caused by the railway at highway crossings.

RECOGNIZANCE TO KEEP THE PEACE, &c.

Division 5 of the criminal code of this State, in force July 1st, 1874, provides that judges of courts of record, justices of the peace, &c., are conservators of the peace, and may issue warrants on complaint, and if the complaint shall be sustained by proof, "the defendant shall be required to give a recognizance with sufficient security, in such sum as the court or magistrate may direct, to keep the peace toward all the people of the State, and especially towards the person against whom, or whose property there is reason to fear the offense may be committed, for such time not exceeding twelve months, as the court or magistrate may order. But he shall not be bound over to the next court unless he is also charged with some other offense, for which he ought to be held to answer at such court." This division of the code contains twenty paragraphs, and is a great improvement on the division on the same subject heretofore in force in this State.

The attention of State's attorneys and justices of the peace throughout the State is hereby specially called to this division of the criminal code. As the change in the procedure is so radical that to proceed under the law in force prior to July 1st, would be manifestly wrong, I call attention to this statute for the reason that justices of the peace are not yet furnished with the laws of 1874.

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Circuit Court of Outagamie County, Wisconsin.

LOUIS SCHINTZ, Executor of the Last Will and Testament of ANSON BALLARD, deceased v. HARRIET S. BALLARD, et. als.

1. By the terms of the will, the appropriations to the Institute are to be made, only on the condition that $75,000 shall be contributed by the citizens of Appleton, and the same to be actually paid to the said Institute, or secured to the satisfaction of its board of directors, and of the executor, within three years from the time of the testator's death, or from the time the executor may have $50,000 in readiness for the first endowment mentioned in the will. Held, that the proposed endowment is made to depend upon a condition that may never happen, and that until the contingency does occur, that there is no beneficiary legally capable of receiving the $75,000 nor any part thereof, and that without such a beneficiary the trust is not *present* and *active*, two elements indispensably requisite to the validity of the trust.

2. That this will, if it could be construed as a conveyance of the real estate to the executor in trust, or as giving him a power of sale for the purpose of the intended trust, might, in view of the fact that it allows three years or more, within which the conditions may be fulfilled, create a perpetuity.

3. That by the terms of the statute of Wisconsin, the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate.

4. That so much of the will as was intended for the benefit of the Appleton Collegiate Institute, or any other similar institute, &c., held null and void. And that the property intended to be conveyed to the institute, must go as the law directs in relation to the descent of the property of intestates.

5. That the personal property that shall remain after the payment of all debts and funeral expenses and expenses of administration, must be distributed as follows: One half to the defendant Harriet S. Edwards, under the residuary claim of the will, and the other half, which is not legally disposed of by the will, to the heirs at law, one of whom is the said Harriet S. Edwards, under the statute of Wisconsin.

This was a complaint filed by Louis Schintz, executor of the last will and testament of Anson Ballard, deceased. The complaint makes the widow and heirs at law of Anson Ballard, deceased, the Appleton Collegiate Institute, and A. Scott Sloan, the Attorney-General of the State of Wisconsin, defendants to the complaint, and asks that the court construe the will, which is set out in the complaint as follows:

"I, Anson Ballard, of Appleton, Wisconsin, do make, publish, and declare this my last will and testament, that is to say:

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1st. My will and testament bearing date July 27th, 1867, is hereby revoked and annulled.

2d. After the payment of all my just debts, funeral expenses and expenses of administration, I give and bequeath to my wife, Harriet Story Ballard, in lieu of dower in my other property, all of block 13, being the homestead, undivided ½ of E. 34 feet in width, of the south 120 feet in length, of lot 8, block 28, being my interest in the Bank Building property in the 2d Ward of the City of Appleton; also, all my household furniture and other property in and about my said homestead; also, the $5,000 in her favor on my life insured by policy in the Equitable Life Insurance Company of New York; also, another policy in said company of $2,000 on my life; also enough money or securities to pay and discharge any incumbrance that may remain on said homestead, to Have and to Hold the same to her, her heirs, representatives and assigns, forever.

3d. All the residue of my property, of whatever kind, I give to my executor in trust for the following uses and purposes to-wit:

(1.) Of the moneys, securities and stocks on hand, or the first that may come into his possession, (after deducting such amount as in his judgment shall be necessary to retain for current expenses of my property,) I desire that fifty thousand dollars in value be paid to the "Appleton Collegiate Institute" for a permanent endowment, of which the income only is to be used.

(2.) Of the remaining moneys, stocks and securities on hand, or that may be next received by him, I desire that the further sum of twenty-five thousand dollars in value be paid to the said Appleton Collegiate Institute for a permanent endowment fund, (of which the interest only is to be used,) for a public gymnasium and reading rooms and library, to be free to the public, subject to such rules and regulations as the board of directors of said Institute may from time to time be prescribed.

The foregoing appropriations to the Appleton Collegiate Institute are to be made only on condition that the sum of seventy-five thousand dollars shall be contributed by the citizens of Appleton, (in addition to any sum that may have been heretofore paid or pledged,) to be invested in substantial buildings and

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equipments for the work of said Institute, the same to be actually paid to said institution or productively secured to the satisfaction of its board of directors and of my executor, within three years from the time of my death, or from the time my executor may have said fifty thousand dollars in readiness for said first mentioned endowment; twenty-five thousand dollars of the amount contributed by the people of Appleton, may be expended at the option of the board of directors of said Appleton Collegiate Institute, in building on the grounds of said Institute, or in building on some suitable lot to be provided for the purpose of said gymnasium, reading rooms and library, at or near the business centre of the city, said building to be designed to accommodate both sexes with suitable parlors, and to provide especially for the young, a pleasant place of resort, where they will be surrounded with wholesome influences.

Till such time as the seventy-five thousand dollars aforesaid shall be paid, or secured as above specified, the income from the above proposed endowment shall belong to my said executor as a part of my said estate, to be disposed of as hereinafter provided. In case the people of Appleton shall refuse or neglect for the space of three years after said first mentioned fifty thousand dollars endowment is in readiness, to comply with the foregoing conditions on their part to be performed, said executor is hereby directed immediately after such default to transfer said endowment funds, to-wit: the fifty thousand dollars and twenty-five thousand dollars to such other educational institution in Wisconsin as may be conducted on substantially the same principle and methods of instruction as are adopted by said Appleton Collegiate Institute, and as shall comply with the like conditions above specified, within two years from and after the default aforesaid of the people of Appleton.

(3.) In case the people of Appleton shall duly comply with the conditions hereinbefore specified on their behalf, and within the time limited therefor, my executor is hereby directed to cancel and discharge any claim or lien that I have, or may hereafter have, on the property of said Appleton Collegiate Institute on the further condition that all the other debts of the said Institute shall be at the same cancelled and discharged.

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(4.) All the residue of my property, so fast as it can be advantageously converted into money, or productive securities, to be divided equally between my said wife and the said Appleton Collegiate Institute, or the Institution receiving said endowments.

I trust that my wife and children will approve of the disposal hereby made of my property, and that they will co-operate with my executor in carrying into effect the provisions hereof. With economical, industrious habits, on the part of my family, the foregoing bequest to my wife will be ample for the comfortable support of herself and children. Without such habits, property is only a curse to its possessor till it comes to nought.

4th. I hereby nominate and appoint Louis Schintz, of Appleton, Wisconsin, executor of my last will and testament; and I request that he be not required to give bonds for the performance of the duties herein prescribed, or for the execution of said trust, unless the law of the land should imperatively require in all cases bonds to be given, and in that case I request that the bonds be as light as will answer the requirements of the law."

Finches, Lynch & Miller, attorneys for the plaintiff.

Gregory & Pinney, attorneys for the widow and heirs.

The opinion of the court was delivered by

Ellis, J.—The plaintiff asks a legal construction of the last will and testament of Anson Ballard, deceased; a copy of which is set forth in the complaint herein.

I think it is plain from the language of this will that the testator's intention was, after revoking his will of July 27th, 1867, and after making the gifts and bequests to his wife set forth in the second clause of the last will, to convey to his executor all that might remain of his real and personal estate (debts and expenses being first paid) in trust for the Appleton Collegiate Institute.

I think it is equally plain from the expressions in this will, that the testator intended to authorize and empower his executor to sell the property, both real and personal, and to convert the same into money or productive securities, for the purposes of the trust he had in view.

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But it is my opinion that these intentions of the testator cannot be lawfully effectuated, and that the trust is invalid. By the very terms of the will, the appropriations to the Institute are to be made, *only on the condition, amongst others, that seventy-five thousand dollars shall be contributed by the citizens of Appleton*, the same to be actually paid to said Institute, or secured to the satisfaction of its board of directors, and of the executor, *within three years* from the time of the testator's death, or from the time the executor may have fifty thousand dollars in readiness for the first endowment mentioned in the will.

The proposed endowment, is thus made to depend upon a contingency which may never happen; and, until the contingency does occur, there will be no beneficiary legally capable of receiving the seventy-five thousand dollars, or any part thereof. Without such a beneficiary the trust is not *present and active*, two elements indispensably requisite, according to the authorities, to the validity of the trust. *Levy* v. *Levy*, 33 N. Y., 125; *Hawley* v. *James*, p. 151, 16 Wend.

Besides the non existence of a beneficiary capable of claiming or receiving the trust funds, this will, if it could be considered as a conveyance of the real estate to the executor in trust, or as giving him a power of sale for the purposes of the intended trust, might, in view of the fact that it allows three years or more within which the conditions may be fulfilled, create a perpetuity. The authorities are to the effect, that even a possibility at the creation of the limitation, that the event on which it depends may exceed the continuance of two lives in being, is fatal to it. *Irving* v. *DeKay*, 9 Paige, p. 52, &c.; *Hawtey* v. *James*, 16 Wend. 61; 4 Kent's Com. 283.

The Wisconsin statute provides, that "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being, at the creation of the estate. (R. S. ch. 83, sec. 15.)

For these reasons I am of opinion that so much of the will as was intended for the benefit of the Appleton Collegiate Institute, or any other similar educational institution in Wisconsin, which might comply with like conditions before specified,

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within two years from and after the default of the people of Appleton, is null and void. Since this portion of the will cannot be sustained, the property intended to be conveyed by it must go as the law directs, in relation to the descent of the property of intestates. So much thereof as is real estate, to the heirs at law. This will give to the children of the testator all the real estate except the premises demised to the wife. No claim having been made to the contrary at the hearing, or by the answer, I assume that the devises and bequests to her are, or will be accepted in lieu of dower.

As to the personal property, so much as shall remain after payment of all the debts, funeral expenses and expenses of administration, must go, I think as follows: One half to the defendant, Harriet S. Edwards, under the residuary clause of the will, (see 6 Paige, 619,) and the other half which is not legally disposed of by the will, to the heirs at law—one of whom, so far as his personal estate is concerned is the said Harriet S. Edwards, inasmuch as she became entitled under our statute, chap. 99, R. S., sec. 6, to the same share of such residue as a child of the testator acquired. That she is not precluded by any provisions of the will from claiming this share of the personality undisposed of, appears from Jarmon on Wills, vol. 1, p. 390, and the authorities there cited.

Mayor's Court of Scranton.

GEO. E. AND CHAS. W. NORTHUP, BY THEIR NEXT FRIEND, EMILY A. NORTHUP v. THE FIRST NATIONAL BANK OF SCRANTON.

1. A preliminary injunction should be granted only to prevent irreparable mischief.

2. Such mischief is that for which the law affords no adequate remedy; when such remedy exists an injunction should not be granted.

3. Such remedy is one that affords a full, speedy, complete, feasible and compensatory redress.

4. The bill should aver such mischief, or state facts from which it can be inferred. In this respect the bill is amendable.

5. The right to an injunction must be clearly established, not left in doubt.

6. When a preliminary injunction has been erroneously granted, it should be dissolved on motion.

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7. United States bonds are commercial paper, pass by delivery, and subject to all its incidents.

8. A bona fide holder for value of commercial paper has an indefeasible title to it, though he receives it from one without title to it, and fraudulently in possession of it.

9. Such holder has a legal and equitable title to such paper, though it had been stolen from the owner and advertised.

10. When one takes commercial paper as a collateral security for the payment of a debt contracted on the credit of such security, such debt is a valuable consideration.

11. A guardian has the exclusive right to the custody and management of his ward's estate, and a chancellor cannot restrain the guardian from the management of such estate, until proceedings to remove him are begun or contemplated.

12. The extension of time for payment of a debt, and leaving a pledge still in security for the payment, is not a new pledge for the payment of an antecedent debt.

Motion to dissolve preliminary injunction.

Opinion by WARD, Recorder.

The plaintiffs seek to have this court restrain by injunction the defendant from disposing of certain United States bonds, designated in their complaint.

The complaint sets forth, in effect, that the plaintiffs are minor children, and that one S. A. Northup is their guardian; that among the property turned over (by the plaintiffs) "to the said S. A. Northup," their guardian, "for safe keeping, were thirteen United States bonds," * * * "altogether of the value of thirty-three hundred dollars;" that said guardian has wrongfully and fraudulently pledged the said bonds to the defendant as security for his individual debt; that defendant has offered and intends to dispose of the bonds; that their said guardian has applied for the benefit of the bankrupt law of the United States; that defendant well knows the bonds to be the property of the plaintiffs; and further, "if the defendant is permitted to dispose of said bonds, the plaintiffs will suffer great loss and damage. The prayer is for the relief which I have mentioned, and for a decree of the court that defendant deliver the said bonds to the plaintiffs. On the 23d of November the bill was filed, and application was then made to me, at chambers, for a preliminary injunction, which was allowed to issue. It issued without

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notice to the defendant. A rule was entered at the same time to dissolve the injunction, returnable 25th November, at ten o'clock A. M., at my chambers. From the complaint it is impossible to determine whether the plaintiffs intend to charge that the bonds were pledged for an antecedent debt of the guardian, or for one contracted at the time the pledge was made. It does not charge the defendant with any wrong or fraud in taking the pledge, nor with any knowledge or notice that the bonds belonged to the plaintiffs, nor of the guardian's wrong or fraud in disposing of them, nor of S. A. Northup being their guardian, or of their existence at that time. It does not in any way aver that the disposal of the bonds by the defendant would work irreparable mischief to the plaintiffs, nor does it state any facts from which such mischief can be inferred. It merely avers, "that if the defendant is permitted to dispose of said bonds, the plaintiffs will suffer great loss and damage." There are very many wrongs from which a party may sustain great loss and damage that can be fully compensated, and for which there is a full, speedy and adequate remedy at law. In such cases a chancellor will not interfere by an injunction: *Audenried* v. *Philadelphia and Reading R. R. Co.*, Leg. Int. No. 2, 1871, page 12, opinion by Sharswood, J.; Brown's Appeal, 12 P. F. S. 17. There is nothing in the complaint that entitles the plaintiffs to the equity or relief sought in their prayer. I could with propriety dissolve the injunction without giving the matter any further attention; but, the bill being amendable, I will give the case a further examination on the merits as the same now appear to me, taking the complaint and all the affidavits into consideration. Whatever opinion I now entertain, being founded upon the facts now before me, cannot prejudice the case on a final hearing, when new facts may be disclosed. When the complaint and all the evidence in a case taken together do not establish the plaintiffs right to the whole or any portion of the equitable relief sought, but leaves the matter in doubt, a preliminary injunction ought not to be allowed, and when it has been so erroneously granted it should be dissolved. See authorities above cited. If the bank has a legal and equitable right to the bonds in dispute, it has a corresponding right to dispose of them. If such is the case, of

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course there can be no equity in the plaintiffs' case. The affidavit of S. A. Northup, put in evidence by the plaintiffs, is as follows: "That the loan for which the bonds designated in the plaintiffs' bill were pledged in May, 1870, and deponent" (meaning the said S. A. Northup) "gave his promissory note for the same, amounting to $3000, which said note became due, and the time of payment has been extended from time to time, deponent paying the discount thereon in money, the last extension having expired on the 23d of November, 1871." This is what he swears to in his affidavit—*verbatim*. The affidavit and the bill of complaint are all that the plaintiffs have to rely upon. In my opinion they come far short of establishing the plaintiffs' right to the relief sought, or to any portion of it. They leave the whole question in doubt. The affidavit, however, establishes that the bonds were pledged by said S. A. Northup as a collateral security for the payment of a debt contracted by him at the time he pledged the bonds to the defendant. It also establishes that when time for payment of the loan came round it was not paid, but extended from time to time by S. A. Northup and the bank, Northup paying for such extensions and leaving the bonds in pledge on the original terms. This, the able counsel for the plaintiffs attempts to argue, was a new pledge, one made anew at each time of extension, for the payment of an antecedent debt, and consequently, though the bank in the first instance may have received the pledge for value, in each of the latter instances did not pay value for it. That line of argument is very "far-fetched," and more subtle than logical or legal. He adduces no authorities to fortify it; indeed, I am inclined to believe that authorities in support of his views are *more* than meager. I fail to understand how the extension of time for payment of the debt, and paying a money consideration for such extensions, and still leaving the pledge as security for the payment of the debt, can leave the debt an antecedent one, and at the same time make the pledge a new one. The payment of the debt in the first instance was a condition precedent to the redemption of the pledge. Payment was to precede redemption. Immediately upon payment the pledge was to be relinquished. Until payment made S. A. Northup had no right to demand restoration of the pledge.

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Therefore every extension of time for payment was also a corresponding extension for time of redemption. In other words, each extension of time for payment was a continuance of the time of the pledge, and not a new pledge. The debt has not been satisfied; hence, it follows that the pledge has not been redeemed, relinquished or extinguished. Such being the case, the defendant holds the pledge—these bonds—as collateral security for the payment of the debt of $3000. This narrows the inquiry to whether the defendant has a general or special property in the bonds, coupled with the right of disposing of them? The affidavit of J. A. Linen, put in evidence by the defendant, is to the effect that he is cashier for the defendant; that defendant has had no dealings with the plaintiff, no knowledge or information of them, except from the complaint in this case; that on 24th May, 1870, he, acting for the defendant, loaned $3000 to the said S. A. Northup, and took from him certain United States bonds, amounting in all to $3000; that they were payable to bearer, negotiable and pass by delivery; that they were in S. A. Northup's possession, and that he claimed that they were his property; that the said S. A. Northup, at the time he procured the loan, delivered the bonds to the defendant to secure the payment of the loan, with authority for the defendant in case of default in payment of the loan when due to sell the bonds at public or private sale or at the brokers' board, without notice; that such default had been made, the loan not paid, and that the defendant has the right to sell the bonds, and intends doing so unless restrained by this court; also, that defendant took the bonds in good faith for value advanced, and then paid for them without any knowledge or notice of S. A. Northup's wrongful and fraudulent act, and without knowledge or notice of the plaintiffs having any interest or title in or to the bonds. From all the facts spread out in the complaint and affidavits, I think that at the time S. A. Northup delivered the bonds to the defendant, they were in his hands for management, and were the property of his wards—these plaintiffs—and that his conduct in pledging them for his own debt was wrong and fraudulent, but that the defendant is in no way tainted with the wrong and fraud, because the defendant was no party to it and had no knowledge of the wrong and fraud.

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Under this state of facts the inquiry arises, are these bonds negotiable instruments and subject to the incidents of negotiable paper? They are issued by the United States, payable at a future period of time to bearer. Undoubtedly they were designed for general circulation, and to pass by delivery; and by general practice to do so, pass from one holder to another in the same manner as bank bills. They are of the character of the English exchequer bills, and the bonds issued by the king of Prussia in the early part of the present century. The exchequer bills and the Prussian bonds were for large sums and payable to bearer. They, too, were issued by the government. As early as 1820, the English courts held, that the exchequer bills were negotiable and subject to all the incidents of negotiable paper. *Weekly* v. *Pole*, 4 B. & Adol. 1. In 1824, the English courts held, that the Prussian bonds were negotiable instruments. *Georgies* v. *Meivell*, 3 B. & C. 45. At a much later period, Chancellor Walworth enunciated the same doctrine in the case of the *Attorney General of the State of Illinois* v. *Delafield*. In this latter case the bonds of the State of Illinois had been irregularly and without authority, by a kind of ring process, put in circulation by the officers and agents of the State, and the proceedings in the New York court was to restrain by injunction, Delafield from negotiating the bonds to innocent persons, &c. The chancellor, in rendering the opinion, says: "If these securities, therefore, pass into the hands of *bona fide* holders, who have no notice of any irregularity or want of authority on the part of the officers or agents of the State who put them in circulation, the complainant (the State) is bound both legally and equitably, to pay them to such holders." The case went up to the court of errors, and was there affirmed. Justice Bronson, in delivering the opinion of the court, says: "The bonds are negotiable instruments, the title to which will pass by mere delivery, * * * and are valid securities in the hands of a *bona fide* holder." The same principle is settled in New Jersey. *Morris Canal and Banking Co.* v. *Fisher*, 1 Stockton Ch. R. 667. Also, in Massachusetts: 8 Gray, 575. The same is the law of Pennsylvania: Watt. R. 260–384; *County of Beaver* v. *Armstrong*, 8 Wright, 63. The bonds in question are negotiable instruments and pass

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by delivery, the same as do negotiable notes and bills of exchange. The next inquiry is, was the transfer of these bonds to the defendant for a valuable consideration paid or advanced at the time they were delivered? The facts before me establish that the bonds were pledged to secure the payment of the loan of $3000 at the time it was effected, and the loan was procured on the credit of the bonds. Therefore, the defendant is a *bona fide* holder of these bonds for value paid to said S. A. Northup from the defendant. Is the plaintiffs' title to these bonds extinguished in whole or in part? As early as 1760, Lord Mansfield, the great expounder of commercial law, held that negotiable paper, though stolen, became the property of the holder who received it from the thief for value, without knowledge or notice of the larceny: *Miller* v. *Race*, 1 Burr, 452. In 1763, Lord Kenyon, another great jurist and chancellor, held that lost negotiable paper, duly advertised by the loser, found by a person not entitled to it, and discounted for him by one who had no notice or information of the fact or fraud of the person so disposing it, took a good title to it both in law and equity, and could recover upon it: *Lawson* v. *Weston*, 4 Espinasse, 56. This principle was afterwards shaken in *Gill* v. *Cubit*, in which Chief Justice Abbot held quite a contrary doctrine. The judiciary and the bar wrangled over the principle for about ten years, when the complaints of the commercial world brought the question before the king's bench, which had been specially remodeled for the purpose of settling the vexed question, and in several successive cases it was there conclusively settled by overruling *Gill* v. *Cubit*, and affirming the ruling of Lord Mansfield and Lord Kenyon: *Crook* v. *Jades*, 5 Barnwell and Adolphus, 909; *Backhouse* v. *Harrison*, id. 1098; *Goodman* v. *Harvey*, 4 Adolphus and Ell's, 870. Such has remained the settled law of England from that early time until now. The same principle is equally well settled in the United States: *Bush* v. *Scribner*, 11 Comstock's R., 388; *Worcester Bank* v. *Dorchester and Melton Bank*, 10 Cushing, 488; *Heel* v. *Wilson*, 16 Barb. 548; *Jarvis* v. *Rodgers*, 13 Mass. R., 105; *Bowman* v. *Wood*, 15 Mass. R. 534; *Garlie* v. *James*, 12 Johnson, 146; *Thompson's Appeal*, 10 Harris, 16; *Phelan* v. *Moss*, S. C. Pa., Leg. Int., 14 April, 1871.

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I am aware that a contrary doctrine was held to be law in *Bettzhoover* v. *Blackstock*, 3 Watts, 20; but I also know that that case was decided upon the authority of *Gill* v. *Cubit*, and made after the latter had been overruled in the English courts, but before the overruling had been published in this country; therefore it is not authority. There is no doubt that these bonds belonged to the plaintiffs at the time S. A. Northup delivered them to the defendant, and that Northup was and is the plaintiffs' guardian, and that the bonds were in his lawful custody, held by him in trust for his wards. The pledging them for his own debt was a gross fraud upon his wards, but inasmuch as the defendant knew nothing of the guardian's fraud, or of the plaintiffs' interest or title to the bonds, and paid value for them, the defendant is a *bona fide* holder of them, and has a legal and equitable title to them to the extent of the property the defendant has in them. The defendant has a special property in them to the amount of $3000, with interest on the same from the expiration of the last extended time for payment, coupled with the right to sell them for the best price that can be gotten for them by a judicious sale; and after satisfying the $3000 and interest from the proceeds of such sale, if anything remains it will belong to the said plaintiffs. The plaintiffs' title, or property to and in said bonds, is extinguished to the extent of the interest and title that the defendant has acquired in them. S. A. Northup being the duly appointed guardian of the plaintiffs, has the undoubted right to manage their estate until he shall have been removed from such management, or until proceedings shall have been begun or contemplated for such removal. The plaintiffs' complaint does not charge that their guardian has been removed from the management of their estate, or that proceedings have begun or are contemplated for that purpose. For this reason I cannot by injunction restrain the bank from paying over to S. A. Northup the contingent fund that may accrue to the plaintiffs as aforesaid. I cannot see that the plaintiffs are entitled to the whole or any part of the relief they seek; therefore, for the reasons assigned, the preliminary injunction heretofore allowed is hereby dissolved.

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The following head-notes were received from the Hon. Jas. B. Black, official reporter of Indiana, and will appear in vol. 44, Indiana Reports:

OPINION OF COURT.

How far Authority.—The language used in an opinion is always to be restricted to the case before the court, and is authority only to that extent. The reasoning, illustrations, and roferences contained in the opinion of a court are not authority or precedent, but only the points arising in the particular case, and which are decided by the court. *Lucas* v. *The Board of Com'rs of Tippecanoe Co.*, 524.

PRINCIPAL AND SURETY.

Fraud of Principal in Obtaining Signature of Surety.—Where the payee of a promissory note filled the same up and gave it to the maker to obtain the name of a surety thereon, and the maker applied to a person who could not read or write, and asked him to sign the note as surety, stating to him that it was for a certain sum smaller than that expressed in the note, and he thereupon authorized the principal to sign his name to the note, without asking that it might be read, the payee, not having anything to do with procuring the signature, and not being chargeable with any fraud or deception. *Held*, that the surety was liable for the amount of the note. *Craig* v. *Hobbs*, 363.

PROMISSORY NOTE.

Assignor.—Diligence.—Consideration.—The request of the assignor to the holder not to sue the maker of a promissory note not governed by the law merchant, without any consideration for the delay, is a reasonable and valid excuse for not bringing such suit. *Lowther* v. *Share*, 390.

RAILROAD.

1. *Pleading.—Negligence.*—A complaint against a railroad company charged that through the fault, misconduct, and negligence of the servants and employees of the defendant in running the locomotive and train out of their regular time and at a high rate of speed, to-wit, forty miles an hour, and without giving any of the proper signals of their approach, the locomotive struck and killed two mules of the plaintiff, then and there upon the railroad track, at a point where a highway crossed the railroad.

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Held, that this was a sufficient statement of negligence. *The I. C. & L. R. R. Co.* v. *Hamilton*, 70.

2. *Signals.*—There is no statute in this State that requires railroad companies to blow the whistles or ring the bells of their locomotives on approaching a highway crossing, but that duty may devolve upon them in the exercise of ordinary care, without a statute. Whether in a given case ordinary care requires the making of such signals, is a question for the jury. *Ib.*

3. *Killing Stock.*—In a complaint under the statute to recover for stock killed by a railroad train, where the road is not fenced, it is sufficient to aver that the road was not securely fenced in at the place where the animal got upon the track. *The P., C. & St. L. R. R. Co.* v. *Brown*, 409.

4. *Same.—Defective Fence.*—A small portion of a fence along a railroad track was burned on Thursday. The next Sunday a horse escaped through the opening to the track and was killed on that day by a passing train. The section boss, whose duty it was to repair fences, had passed over that part of the road twice a day between the time of the injury to the fence and the killing of the horse. *Held*, that, under the circumstances, the company had had sufficient time to repair the fence and must be held to have had notice of the defect. *Held*, also, that as the company was running its trains on Sunday, it could not claim exemption from the labor of repairing the fence on that day. *The T., W. & W. R. W. Co.* v. *Cohen*, 444.

ATTORNEYS' DOCKET.

We have examined the attorneys' docket prepared by W. L. Gross, of Springfield, Illinois, and for convenience and economy we cordially recommend it to the profession. The attorney can so keep it that he may know the exact condition of each case in which he is engaged, showing date of filing, præcipe, declaration, plea, replication, notice to take depositions, &c. It must prove a great convenience to the profession. I believe it is for sale in most of the book stores in this State.

The act cited in the article entitled "Practice," on page 270, was amended by the act of 1874. Gross St. vol. 3, p. 311.

With this number we add to our list of law cards, that of J. F. Culver, of Pontiac, Livingston co., Illinois.

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THE

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THE LAW OF RAPE—CHLOROFORM IN RAPE CASES.

Rape is the carnal knowledge of a female, forcibly and against her will. "The term 'against her will,' was used in the old statutes, convertibly with, without her consent, and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent although no positive resistance of the will can be shown." Wharton Crim. Law, §1141; *Rex* v. *Fletcher*, Bell C.C. 53–8; Cox C.C. 131; *Rex* v. *Champlin*, Car. & Kn. 746; *Com* v. *Baecke*, 105 Mass. 376; *Rex* v. *Page*, 2 Cox C.C. 133. Some medical jurists have argued that a rape cannot be perpetrated on an adult woman of good health and vigor, and they have treated all accusations made under these circumstances as false. Whether this theory be true or not is immaterial to our present inquiry. The question as to whether or not a rape has been committed is one of fact for a jury and not for a medical witness. The fact of the crime having been actually perpetrated can be determined only from the evidence of the prosecutrix, and of other witnesses; still a medical man may be able to point out to the court circumstances which might otherwise escape notice. And in some cases the opinion of medical witnesses may be of great weight. "Setting aside the cases of infants, idiots, lunatics and weak

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and delicate or aged women, it does not appear probable that intercourse could be accomplished against the consent of a healthy adult, except under the following conditions:" 1. Acquiescence obtained by fear. 2. By ignorance of the nature of the act. 3. By mistake, or imposition as to the person. 4. By artificial stupefaction. In Champlin's case, *supra*, it was proved that the prisoner made the prosecutrix drunk, and that when she was in a state of insensibility took advantage of her and violated her person. The jury convicted the prisoner and found that the prisoner gave her the liquor for the purpose of exciting her and not with the intention of rendering her insensible, and then having sexual intercourse with her. The judges held that the prisoner was properly convicted of rape. The nature of the substance whereby insensibility is produced is unimportant. Thus the vapors of ether and chloroform have been criminally used in attempts at rape. In a case which occurred in France, a dentist was convicted of a rape upon a woman to whom he had administered the vapor of ether. The prosecutor was not perfectly unconscious, but she was rendered wholly unable to offer any resistance. "Med. Gaz.," vol. 40, p. 865.

A dentist, Dr. Beale, was convicted of rape under somewhat similar circumstances, in Philadelphia, in 1854. In this case the court said: "The last and most important reason relates to the weight of evidence, and the alleged want of evidence, of penetration. The examination of the whole case, which this reason obliged us to make, certainly convinced us that it was not free from difficulty. In considering it, we must regard first the means of proof. 2d. The evidence given. The witness, whose evidence was relied on for the proof of the perpetration of the offense by the defendant, was Miss Mudge, the prosecutrix. Her competency to testify was not questioned, and her evidence was given to the jury. It appeared that she had been placed under the influence of ether at the time when the alleged offense was perpetrated, and whether what she testified to was an actual occurrence, or a delusion arising from the effect of the ether, was a prominent question made by the defense. A large portion of the evidence was designed to show to the jury the effect produced

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by ether upon the human system, and that its tendency was to excite mental action and produce fancies, which took their color from recent impressions. Upon the evidence thus submitted, the jury were called to decide. This issue was strongly presented, and the proof of the existence of such a delusion was confidently assumed by the defense. What might have been our opinion upon the propriety of relying solely upon the evidence produced by the commonwealth, where the chief witness stated the fact that she was under the influence of ether at the time to which her testimony referred, and in the absence of accompanying corroboration need not now be considered, inasmuch as the defendant assumed to show the actual condition of the witness at the time, and presented the question of her ability to know the facts to which she testified, fairly and fully to the jury. Had this not been so, we are free to say that our opinion might have been different; but after the most anxious consideration, we have been unable to rest upon any principle which would authorize the court to interfere with the decision of the jury upon an issue submitted to them by the defendant; that issue was exclusively one of fact, and by the decision of it we are bound. The reliance to be placed on the statements of the prosecutrix was thus submitted entirely to their consideration. They were to decide upon the credibility of the witness, and of her opportunity and capability of knowing the facts to which she testified. As to her general credibility, no question was made by any one; her character for veracity stood entirely unimpeached. As to her opportunity and capability of knowing the facts to which she testified, much evidence was submitted to the jury. The effect of ether upon the system was explained by many witnesses. Some of these persons exhibited a mental and physical condition very analogous to that described by Miss Mudge as existing in her case; and upon the whole evidence the jury were left to determine whether she was in a state of consciousness which enabled her to know what was going on around her, or whether, influenced by a delusion, she had detailed the particulars of a dream. The jury found in favor of her consciousness, and believed that the facts detailed by her were realities and not delusions. Is it for the court to decide that in this the jury have erred? Why

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was the evidence of men of science, and of persons who had themselves been under the influence of ether, submitted to the jury, unless to enable them to judge to what extent the administration of ether produced delusion, and whether the witness was so influenced by it? This was the particular province of the jury. In every case where the mental or moral condition either of a party or a witness is put in issue, the decision of such condition is for the jury. Where insanity or intoxication is relied on as defense, it is for the jury to ascertain from the evidence, the extent to which the party is influenced. So the testimony of a witness may be impeached by proof of insanity or intoxication existing at the time of the transaction in relation to which he testifies; but certainly the jury upon the whole evidence must decide the question of credibility. The fact that a person has taken spirituous liquors does not render his testimony inadmissable, unless the effect is shown to be such as to deprive him of the capacity of knowing that to which he testifies. Nor, it is presumed, will the use of ether disqualify, unless the quantity has produced certain effects, of which the jury are the judges. If the mere fact of having taken ether rendered a witness unworthy of belief, upon what principle could these witnesses, called by the defendant to prove the existence of delusion as one of the effects of that drug be offered? They all testified to their condition while under its influence; and if they are worthy of belief, why may not the prosecutrix be equally credible? The existence of delusion in the mind of witnesses was, therefore, regarded as exclusively a question for the jury, and they were strongly charged by the court to consider the evidence bearing upon this part of the defense cautiously, and to hesitate to convict, unless fully convinced that the witness could be properly relied on. We see no reason to doubt the correctness of the decision of the jury upon the evidence submitted to them upon this question. Whether the evidence was all that was proper, or that could have been produced, it is not for us to determine. The defendant called such witnesses as he deemed sufficient for his case; and that he had been unable to satisfy the jury, is not sufficient reason for the interference of the court."

This case was generally believed by the medical profession,

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to be one of anæsthetic illusion, similar to many which have been clearly testified to as having occurred in the experience of different operators. See the "Philada. Med. Exam.," Dec., 1854, for a full review of the case. Also, Wharton and Stille, Med. Jurisprudence, (1873,) § 245–267. The correctness of this verdict was much doubted at the time, and after a careful examination and on the express ground of the doubts entertained a pardon was granted by the governor.

A similar case to this was that of Dr. Davis Green, of Mercer county, Ohio, convicted of a rape on a young girl while partially effected by chloroform, administered to her while asleep. We give the case in full as reported by M. B. Walker, one of the attorneys for the defendant, together with the remarks upon the case by J. C. Reeve, M. D., and published in the Cincinnati Lancet and Observer, in May, 1860.

Court of Common Pleas of Mercer County, Ohio,

JANUARY TERM, 1860.

THE STATE OF OHIO *v.* DAVIS GREEN.

The evidence in this case tends to show that Jane Gray, the prosecutrix, is a truthful, virtuous girl, robust and healthy, of limited education and intelligence, though of good natural sense, aged seventeen years, on 21st August, 1857; that on the night of the 23d June, 1857, she lodged in a bed with a daughter of defendant about of same age, in the north-east corner room of a village hotel in Mercer county; that in the adjoining room south, there lodged a man and his wife, and in the adjoining room west, with an unfastened door between, there lodged the defendant and other persons in other beds; that the prosecutrix and her bed companion retired about ten o'clock P. M., and, after talking a short time, fell asleep; that during the night, the first thing remembered by the prosecutrix was, that the defendant had her by the arms pulling her out of bed; that he said to her he was Dr. Green, and that he had come to have sexual intercourse with her; that he placed her in a position with her feet touching the floor and her weight partially resting on the bed and pillows, and that in that position he had complete sexual intercourse with her; that she experienced the pain of rupture of the hymen, but ex-

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perienced upon her clitoris a pleasurable sensation from the coition; the act lasted but a few minutes, and upon leaving her the defendant said to her she must never tell it; that it would not hurt her; he held his hand upon her mouth, and she felt a rag between his hand and her mouth; she heard what he said, was conscious of all that occurred, she tried to speak, but felt so weak or scared, that she could not, or could not speak loud, and did not say but a word or two—said "Go away—Oh dear!" she tried to force him away, but could not; she experienced a ringing sensation in the head, felt weak, drowsy and sleepy, but did not sleep any more that night; she remained in bed until morning, made no outcry, and told no one of the occurrence until about last of December, 1857; next morning she felt unwell and presented a sad and gloomy countenance, and for a week or two was nervous and easily alarmed; the ringing in the head lasted a day or two; for three or four days she could not sit up for any considerable time; the symptoms of weakness lasted two weeks. That time, 23d June, was the usual period for the return of the menstrual discharge, and symptoms of it were felt, but no actual discharge had yet occurred. On the morning of the 24th she observed a spot like blood on her chemise, the only night-dress she wore, which she supposed was a slight menstrual discharge, but that no discharge followed at any time thereafter. She conceived and gave birth to a child on the 26th March, 1858. After retiring to her room on night of 23d June, before going to bed, her nose bled. She never saw chloroform before, but smelled it on trial and believes the smell to be like that she experienced on night of 23d June. She first thought defendant had intercourse with her twice that night, and had told others so, but, on reflection, was sure that it was only once; she saw him with shirt and drawers on, but no other clothing; she made an effort twice, with both hands, to resist him, but could do nothing. She weighed one hundred and thirty pounds, was in good health and had always enjoyed good health. Did not smell medicine when first awoke, but did after defendant left her room, in about six minutes; the effect was unpleasant—can not say painful; her mind was clear from the time she awoke, and she knew everything. Her feet were about six inches apart—more than half her weight

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on her feet, the rest thrown back on the upper part of the bed; the rail of the bedstead came in contact with the middle of her thighs. She made no effort to awaken the daughter of the defendant, though her head was near or touching her; did not halloo or call anybody; her hands were not restrained at any time. Defendant only touched her with one of his hands; is sure that she remembers everything that occurred accurately.

The defendant is a physician. There was a large amount of testimony on both sides, tending to prove the charge and tending to disprove it. The daughter of defendant, a highly intelligent young lady, swears that she slept on the front side of the bed, was not disturbed in the night and smelled no odor of medicine of any kind; saw nothing unusual in the appearance of prosecutrix next morning. The defendant was just recovering from a long and severe attack of phlegmonous erysipelas, the left hand very sore, and poulticed, the neck very stiff and sore, and the right hand also sore and in ulcers. No one about the house heard any noise or disturbance during the night, after the parties had retired. The partitions between the rooms were of boards, had shrunk so that there were cracks between the boards one half inch in width—boards were one inch in thickness—had stood for twenty years; the bed was of ordinary size.

N. L. Hibberd, *J. S. Conklin*, *J. H. Hart* and *Joseph Plunket*, for State.

M. B. Walker, *F. C. Le Blond*, *E. M. Phelps*, *C. P. Edson* and *P. Depuy*, for defense.

M. B. Walker, for defense, cited the following authorities: Dr. Snow on Anæsthetics, pp. 34 to 48, inclusive; *Ib.*, 98; Wharton & Stille's Med. Jurisp., secs. 728 to 733, inclusive, note *j; Ib.*, sec. 443, note *q;* Dunglison's Physiology, vol. II., pp. 368, 450, 420, 423, 470, 369, 423, 465, 424, 425 and 427; Wilson's Anatomy, pp. 548, 550, 361, 366.

The evidence and arguments of counsel being closed, the court, Wm. Lawrence, judge, charged the jury, substantially, as follows:

The indictment charges the defendant with rape upon Jane Gray, on the 23d June, 1857. The defendant pleads not guilty. The issue thus made you have been sworn well and truly to try.

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The indictment is drawn upon the 5th Section of the Crimes' Act of March 7th, 1835, (Swan's R. S., 269, 1 Crimin. 184,) which provides, "that if any person shall have carnal knowledge of any other woman or female child than his daughter or sister, forcibly and against her will, every person so offending shall be deemed guilty of a rape," etc.

In this case rape may, therefore, be defined the unlawful carnal knowledge of a woman other than the daughter or sister of the accused, forcibly and against her will. The definition is only important as it may serve to call the attention of the jury to the facts which must be proved, in order to warrant a verdict of guilty, which are these: That Jane Gray was not the daughter or sister of the defendant (Crimes, Sec. 5); that he had carnal knowledge of her, which requires penetration and emission (*Williams* v. *Ohio*, 14th Ohio R. 222); that it was had forcibly; that it was against her will; that it was thus had in Mercer co., Ohio. These facts must be established by lawful evidence (the judge then stated the law—the province of the jury to determine the facts; that of the court to determine the law; the presumption of innocence; the law as to reasonable doubts, etc., substantially as in *Robbins* v. *Ohio*, 8th Ohio St. R. 148, 152; and after explaining sufficiently the several facts to be proved, proceeded as follows): The carnal knowledge must also have been *against the will of Jane Gray.* If unlawful sexual intercourse should be proved, the law does not *presume*, from that fact alone, that it was against the will of the female; there must be sufficient evidence, by circumstances or otherwise, of that fact. (See *State* v. *Crow*, 10th West. Law Journal, 501.) But if the facts and circumstances show that the defendant forcibly had carnal knowledge of Jane Gray, without her consent *to the act*, he knowing that fact, that is sufficient evidence that it was against her will. (See Wharton's Crim. Law, secs. 1141, 1146, n.; Wharton & Stille's Med. Jur., secs. 459, 463; *Regina* v. *Camplin*, 1 Car. & K., 746; 1 Denis' C. C., 90. If the defendant forcibly had unlawful sexual intercourse with Jane Gray without her consent, and the act was commenced and completed by penetration and emission while she was asleep, unable to know the fact, or before she was sufficiently awake to enable her will and understanding

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to determine the nature and consequences of the act, and the defendant knew these facts, then he is guilty of rape. Wharton & Stille's Med. Jur., secs. 440, 443, n. *q;* Wharton's Crim. Law, secs. 1146, 297, 631, 2159; 1 C. & K., 746; 1 West. Law Monthly, 333; 3 Gr. Ev., 211; 14 Ohio Rep., 222.

There is, perhaps, but a single published case of alleged rape effected by means of chloroform—that of Dr. Beale, of Philadelphia, published in Wharton & Stille's Medical Jurisp. The defendant was pardoned by the governor of Pennsylvania. The subject of chloroform is very fully discussed in a late valuable work by Dr. Snow of London on Anæsthetics.

If the defendant administered chloroform to Jane Gray, and thereby rendered her unconscious—without will—and in that condition the defendant, knowing it, had carnal knowledge of her forcibly, then he is guilty of rape. Wharton & Stille's Med. Jur., secs. 458, 459.

Generally, the crime of rape is committed upon females in the enjoyment of all their faculties. In such cases the inquiry, whether the crime was against the will of the female, is determined by evidence of acquiescence or resistance; and as the State is required to prove the *absence of consent*, in order to make out guilty, a prosecution will generally be defeated by evidence of *acquiescence.* This must always be so when the prosecutrix is sufficiently in the enjoyment of her faculties to understand the nature and judge of the consequences of sexual intercourse, or when the defect of capacity, which induces acquiescence, is unknown to the accused. If the prosecutrix, having the capacity to understand the nature and judge of the consequences of sexual intercourse, and the power to resist by act or word, and neither such capacity nor power was overcome by force, fear, or chloroform, her acquiescence in the act would defeat a prosecution for rape. In such case, any consent thus given, however reluctantly, even if the judgment and conscience did not approve the act, but if the will yielded to the influence of sexual desire or other motive, there can be no rape. In such case, passive submission is evidence of acquiescence; and if her conduct was such that the defendant might fairly infer that she acquiesced, and he did so infer, then he is not guilty of rape. If she acquiesced through force,

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fear, chloroform or any defect of capacity, but the cause of such acquiescence was unknown to defendant, he is not guilty of rape. 1 West. Law Monthly, 333. But the mind is composed of various faculties or powers, each operating and affecting others more or less remotely. The destruction or suppression of one may defeat or pervert the capacity of another, and thus the power to acquire just perceptions or form just conclusions upon some, or all subjects, may be impaired or annihilated. This idea is illustrated in a note to sec. 443 of Wharton & Stille's Med. Jur., in relation to certain experiments with chloroform, where it is said: "In the above observations it may very plainly be seen that the will no longer exercises its control over the mental operations. The thoughts run headlong upon their accustomed track, or in any direction in which they may have been impelled by fortuitous impressions made upon the nerves of general or special sensation; there is no power to restrain them, and while the dream is a pleasant one, no desire to do so." It is the right of every human being to enjoy all these faculties in the fulness of their natural vigor. Webster has defined the *will* to be "that faculty of the mind by which we determine either to do or forbear an action; the faculty which is exercised in deciding, among two or more objects, which we shall embrace or pursue;" and he adds, "the *will* is directed or influenced by the *judgment*, the understanding or *reason* compares different objects which operate as motives; the *judgment* determines which is preferable, and the *will* decides which to pursue. In other words, we *reason* with respect to the value or importance of things; we then *judge* which is to be preferred, and we *will* to take the most valuable. These are but different operations of the mind, soul, or intellectual part of man." I present these metaphysical views (whether correct or not the jury will determine) merely to illustrate the principle of law I am about to state. When the *will* acquiesces in *coition*, there can not, as a general rule, be any rape; but the acquiescence which defeats a prosecution for rape, is that of a will so far under the enlightened guidance and control of the other faculties, that the mind can fairly comprehend the nature, and judge of the consequences of the act, unless the defect in capacity is unknown to the accused. If the faculties have been

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to some extent suspended by chloroform, but enough remain to reasonably comprehend the nature and judge the consequences of the act, then acquiescence in coition will defeat a prosecution for rape. But if through the influence of chloroform, either directly upon the *will*, or the *consciousness*, or the *faculties* of the mind, or the *sexual* feelings and emotions, (see Wharton & Stille's Med. Jur., sec. 443, note,) the mental capacity is so benumbed, suspended or perverted as to be unable reasonably to comprehend the nature and judge the consequences of coition, and by reason of such condition known to the defendant the act is acquiesced in or consented to, such acquiescence or consent will alone defeat a prosecution of rape; rape may exist with such acquiescence thus knowingly obtained.

It is of the utmost importance that you should ascertain whether chloroform was administered, and if so, whether it deprived the prosecutrix of mental and physical powers. (The judge then called the attention of the jury to the evidence tending to prove and disprove the administration of chloroform.) The jury will find it important to ascertain whether chloroform could be administered during sleep; whether, if attempted, it produced the waking state, and, if administered, its effect upon *consciousness*, the *muscular power*, the organs of *speech*, the *memory*, the *will* faculties, *sexual* excitement, the capacity of *conception*, its tendency to produce *anæsthesia* and *delusion*, and these in all the various stages of its effect upon the *mind* and *body*, both in passing into, during, and in passing out of its effects.

If it be assumed (and whether it should be is for the jury to say) that there is evidence tending to show that chloroform was administered to the prosecutrix while asleep; that sexual intercourse was had with her; that she was conscious of it and all the movements attending it; that she could and did hear and understood words spoken in a low tone; that the intercourse produced upon her clitoris a pleasurable sensation; that this was preceded by the pain of a ruptured hymen; that she did not speak; that she felt a desire to resist physically, endeavored to do so but could not; that the act was followed by pregnancy, and the birth of a child, in two hundred and seventy-six days; that

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she was a vigorous girl, in her seventeenth year, virtuous, truthful, of limited education and intelligence; that the act was at the proper time for the return of the menstrual period, but before any actual discharge, it will be important to ascertain whether there is any stage in the effect of chloroform upon the human system, when these facts can exist consistently with the idea that such intercourse could be had without her consent.

In the case of *Brown* v. *Jamison*, in the superior court of Cincinnati, January 18th, 1860, on motion to discharge an attachment, the defendant having alleged that chloroform was administered to her while asleep, whereby she was robbed, Judge Storer remarked: "In relation to the administration of chloroform to the defendant and her daughter, the court had considered this branch of the case with the utmost deliberation. The evidence of the physicians was to the effect that they had never known of a case in which a person was placed under the influence of chloroform without being woke up, and never heard of any, except in newspaper reports, and that the influence lasted only from five to fifteen minutes, unless where the application was repeated; whereas, in this case, if the operation had commenced at two o'clock in the morning, the daughter of this lady must have been under the influence six hours, and defendant herself about twelve hours. Other narcotics would have produced these results, and there was no evidence that chloroform had been used, except from the fact that it was found permeating the atmosphere. The court were led to the conclusion, and it afforded as much pain as the contrary result (could they conscientiously have arrived at it) would have afforded pleasure, that there was no sufficient evidence that the robbery was committed; they should, therefore, set the attachment aside." But the Cincinnati *Gazette* of January 21st, referring to the same case, thus speaks: "Interesting experiments with chloroform.—In a robbery case tried before the superior court this week, in relation to the administration of chloroform to defendant and her daughter, physicians testified that they had never known of a case in which a person was placed under the influence of chloroform without being woke up. With this statement in view, we understand that Dr. Miller administered chloroform to ten (10) of the in-

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mates of the Commercial Hospital, eight of whom remained under the influence without waking, while the remaining two confirmed the testimony of the physicians before the court."

The medical authorities show that the human female is very susceptible to impregnation for a day, at least, preceding the menstrual discharge; then she is less so during the discharge, which usually continues about four days, because the male semen is liable to be carried off by it; that she is again, after it, very liable to conception until the ovum is expelled from the uterus and vagina. The termination of every menstrual period is followed by the discharge of an ovum generally in five or six days, which may be detected in the form of a greenish or grayish, tough mucous globule, about the size of a pea, either on water or by wearing a bandage. This is generally preceded by a slight watery discharge and putrient pains, barely perceptible. When the ovum has passed away, impregnation is impossible until the recurrence of the sensations preceding the menstrual flow, unless an ovule is detached from the ovaries by some irregularity of nature or violence. This proceeds on the idea that fecundation occurs by the contact of the female ovum with the male semen; that every menstrual period detaches an ovum from the ovaries; that the male semen injected into the female organs of generation during the day preceding the menstrual flow is retained, and impregnates the ovum afterwards detached, and that the ovum, in its passage from the ovaries through the Fallopian tubes and the uterus, may be impregnated at any time before it is finally discharged. This inquiry may be assisted by ascertaining whether the various powers of the mind and body fade away, under the influence of chloroform, gradually and co-equally, and return in like manner, as the influence passes off, or whether some, and if so, what ones precede in thus fading away and being restored, and the order thereof, in all the various stages of the influence, and whether some, and if so, what faculties are retained, and the extent and capacity of them. In the case which I have assumed, where the sense of hearing remained, and the sensations of pain and pleasure were felt in a greater or less degree, these facts would tend to show that the stage or condition of *anæsthesia* had either not been reached or was passed; and if so, it might be

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much more probable that memory would retain its power than if the facts ran otherwise; and if the capacity to remember existed, statements made by its aid might be reliable. But as failure to resist by *word* and *act*, having the capacity to do so, would be strong, if not sufficient evidence of acquiescence in the coition, it would at once become necessary to determine if the faculties of hearing and feeling could co-exist in a sound body without either the capacity to speak or make forcible resistance. If that be not possible, then due weight should be given to such consideration in determining whether she acquiesced in the coition. But if the capacity to hear, feel and remember be consistent with incapacity to speak or forcibly to resist, then the evidence of guilt may thereby be enhanced. What may be the truth, you will determine from the evidence in the case. But if the prosecutrix had the capacity to hear, feel and remember, and a capacity to speak and forcibly resist, but the inclination to do so was lost—the will overcome by the action of chloroform either operating upon the will-faculty or the *judgment* and *reflective* faculties, (or sexual emotions,) so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse—and the defendant, knowing these facts, had unlawful carnal knowledge of her forcibly, that would be a rape; and it would be, in such case, wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as rendered it incapable of having just conceptions and drawing therefrom correct conclusions in relation to the alleged rape. Whether the physical and other mental capacities I have named could operate normally, while faculties of the mind, as the judgment, the understanding, the reflection and reasoning faculties, were so deranged or overthrown as to destroy the capacity to comprehend the nature and consequences of coition, is a question of fact for the jury to determine upon all the evidence in the case. But if the prosecutrix had the capacity to hear, feel, remember, to speak and resist, or in any event, it should not be presumed that her will was overcome without proof of the fact beyond a reasonable doubt. If chloroform may produce *delusion* in the mind of its subject in any of its stages, you will inquire if it existed in this case—whether its existence is consistent with

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the other mental and physical phenomena which you may find to have existed; and you will give due effect to your conclusions upon this subject.

With these principles, as to what facts are necessary to constitute rape, the jury will proceed to inquire into the prominent points of controversy, and ascertain if it is proved that the defendant forcibly had unlawful carnal knowledge of Jane Gray, and if so, was it against her will.

[The judge then read to the jury section 212 of 3d Greenl. Ev., and section 468 of Wharton & Stille's Med. Jur., and called the attention of the jury to the prominent points of evidence relied upon to prove and disprove the fact of sexual intercourse, and upon the subject of acquiescence.]

Verdict of the jury, *Guilty:* motion for new trial overruled.

Motion in arrest of judgment continued to next term, by agreement of counsel.

REMARKS.—The interest which attaches to every case of crime attempted or committed by means of anæsthetic agents demands some remarks upon the medico-legal points in the above trial.

So far as we are aware, but one case has been reported of the commission of rape while the female was under the influence of chloroform. We allude to the celebrated Beale case of Philadelphia; in that, however, there was no doubt in regard to the inhalation of the chloroform; it was given for a proper purpose at a proper time and place, and the question was whether the prosecutrix really suffered a violation of her chastity or was deceived by an erotic dream, which anæsthetics are now well known to produce, the impression of which, after awakening, had all the vividness of reality. In the present case, on the contrary, there was no call or excuse for inhalation of chloroform; if given, its administration must be looked upon as part of the crime itself.

There is an important point, however, in which the two cases are similar, and one which we have not yet seen examined in any work on medical jurisprudence. The prosecutrix in each case distinctly swears that she was conscious of what occurred at the time the offense was committed, and that she suffered pain, yet that she was at the same time deprived of the power of mak-

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ing any resistance or outcry. The question, therefore, for the medical jurist to answer is—Does chloroform produce a condition of the nervous system in which consciousness and sensation are perfect, but volition is abolished? This question did not assume the first importance in the Beale case, while in the one under consideration it must be looked upon as the vital point in the medico-legal aspect of the case.

We do not believe that any one who has had experience in the administration of chloroform would hesitate in giving a negative reply to this question. When this agent is inhaled, it produces its effects in a *gradual* manner; certain portions of the nervous system submit to its influence before others, and the order is well marked, the functions of the cerebrum being first abolished, then those of the cerebellum, afterwards those of the spinal system. Every person who has watched its effects knows that consciousness is deranged and lost before the stage of excitement occurs,—a stage in which there is often a great deal of muscular exertion, such as struggling, and trying to rise from the couch or chair, with loud talking, and that this stage must be passed before the sensibility of the patient is sufficiently abolished for the performance of a surgical operation. From what we know of the effects of chloroform, we do not hesitate to say that there is no such thing as a patient being deprived by it of the power of speech and of voluntary motion without sensation and consciousness being also abolished.

Our opinion is supported by the authority of all writers upon the subject. Snow, in his work on Anæsthetics, enters very fully into a consideration of the physiological effects of chloroform; as several pages are taken up with this description, we cannot copy it here, but present a brief abstract of the different "degrees" of the influence, as he gives them:

In the *first degree* he includes "all the effects of chloroform that exist while the patient retains a perfect consciousness of where he is and what is occurring around him;" in this degree "there is often a considerable diminution of common sensibility" —"in a few cases, the abstraction of a tooth and other minor operations have been performed without pain, whilst consciousness has been retained."

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"In the *second degree* of narcotism there is no longer correct consciousness. The mental functions are impaired, but not necessarily suspended."—"There is generally a considerable amount of anæsthesia connected with this degree of narcotism. . . . . . Loss of sensation is indeed sometimes so incomplete in this degree, especially in children, that the surgeon's knife may be used without pain. . . . . Although the patient is generally silent, he may nevertheless laugh, talk, or sing. . . . . He feels the inconvenience of the vapor he is inhaling, ... and endeavors to push away the inhaler."

In the *third degree* "there are no longer any voluntary emotions, "rigidity and spasms of the muscles occur—the patient mutters in an almost inarticulate and a perfectly unintelligible manner," but "is quite incapable of any perception or consciousness of pain."

In the *fourth degree* the breathing is stertorous, the pupils dilated, the muscles completely relaxed, and the patient perfectly insensible.

In the *fifth degree* the respiration becomes difficult, feeble or irregular, and finally ceases, if the inhalation be continued, and is followed by cessation of the heart's action and death.

Essentially the same description of the gradual influence of chloroform, and of the order in which the different parts of the nervous system are affected, is given by Druitt in the *Surgeon's Vade Mecum;* he says: "It [chloroform] begins by affecting the mind and consciousness. In its smallest dose it stimulates, then disturbs, then suspends the mental operations. It next diminishes the power of the nerves in receiving and communicating, and of the brain in perceiving sensations, whether arising from causes within the body or without; hence it diminishes or abolishes the perception of pain."

Erichsen, in his *Science and Art of Surgery*, says: "The first influence of chloroform appears to be exercised upon the nervous system. The patient becomes excited and talkative, and a state of unconsciousness is induced. . . . . As the administration of the chloroform continues, however, complete paralysis of sense and motion is induced."

We can adduce far more numerous descriptions of the man-

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ner in which ether produces its effects than of chloroform, and if it be objected that this was not the agent employed, and cannot, therefore, bear upon the case, it can be shown that ether and chloroform affect the nervous system in precisely the same order. Snow makes this statement repeatedly, and quotes from Flourens a brief description of the action of ether, which, he says, "will apply equally well to chloroform;" in this description the regular succession and order in which the nervous centres lose their powers is so distinctly and briefly stated that we quote it entire: "First, the cerebral lobes lose theirs, viz., the intellect; next, the cerebellum loses its, viz., the power of regulating locomotion; thirdly, the spinal marrow loses the principle of sensitiveness and of motion; the medulla oblongata still retains its functions, and the animal continues to live: with loss of power in the medulla oblongata, life is lost."

Again: M. Gerdy tried the effect of ether upon himself, "with the object of observing closely its successive phenomena, and found that, with the exception of the vibratory and benumbed sensation which rendered the sense of touch and of pain obtuse, and the noise in the ears which dulled the sense of hearing, his intelligence was clear, his attention active and his *will* so firm that he willed to walk, and did walk, in order to observe the effect upon his locomotion."

It will be remarked that all agree upon the fact that unconsciousness is induced before sensation and motion are abolished. Let us turn to writers upon medical jurisprudence, to see what they say upon the subject. We quote first from Wharton and Stille, section 442, note *q:*

"That advanced stage of etherization in which perfect narcotism is produced, is, in reference to the present question, of considerable importance; for if the power of resistance is then lost, so also is the consciousness of a real motive for it. To be more explicit, if an outrage be perpetrated upon a woman lying wholly helpless and unconscious, she cannot be aware of the liberties which are being taken with her person, and will not, therefore, make any opposition to them. She cannot, moreover, afterwards describe, with elaborate detail, the manner and particulars of the assault, and yet have been incapable of withdrawing

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from or repelling it. If her muscles and voice have been paralyzed, so also has her outward consciousness. Voluntary muscular movement is not paralyzed until the state of narcotism is produced, at which time, however, all outward consciousness is extinct."

Without entering into a full consideration of the effects of anæsthetic agents, the following propositions as to the different degrees of their influence, are given in the last edition of Beck's *Medical Jurisprudence*.

First, A state of insensibility may be induced, rendering the person as completely unconscious of the violation of her chastity at the time as if she was fully narcotized by opium or any stupefying drug.

Second, She may be rendered partially unconscious, or thrown into a state in which she has no adequate appreciation of the outrage, although more or less cognizant to its committal.

Third, The power of opposition, either by words or actions, may be taken away or impaired, even if the faculties of the mind are retained sufficiently to understand the intention of the criminal party.

It may seem at first, that because this last proposition favors the existence of a state in which the power of resistance is abolished and yet the patient is aware of what occurs around her, it can be used in making out the case of the prosecutrix. When anæsthetics were first introduced into practice we often read of cases where the patient watched smiling the different steps of an operation, or talked cheerfully during its progress. Such cases we have read of, but have never seen; nor are they common, for Snow saw but one in the whole course of his experience, which amounted to the administration of chloroform over four thousand times and of ether nearly two hundred times; once he saw a child hold a toy in its hand and look at it attentively while being cut for stone. There is one very important fact to be considered by those who would apply this proposition and these cases to the case before us: it is, that the one says nothing of *sensation* remaining as well as consciousness, and in the other we know that it is abolished from the absence of all expression of suffering, without which the administration of the anæsthetic agent

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would have been a failure. The prosecutrix in this case not only swears as to events that occurred and words which were spoken, but swears positively that she suffered pain and experienced pleasure. As there is not a particle of evidence that the will cannot be exercised so long as sensation remains, although occasionally it may happen that volition is abolished while consciousness of external events remains, we cannot believe that the prosecutrix was deprived by chloroform of the power of making outcry or resistance.

That mere acquiescence by a person incapable of consent is no defense to an indictment for assault, is now finally settled. "But when rape is to be proved, *force* is an essential ingredient, and unless the intention was to ravish the woman by force, an element necessary to constitute this high felony is wanting. Such intention must be either proved or presumed, from the nature of the act." Wharton Crim. Law, 1874, § 1146. It is only by assuming such intent, that the cases of Beale and Green *supra*, can be sustained. As stated above, when narcotics or intoxicating liquids have been administered to her either by the prisoner or through his collusion, it matters not whether the narcotics were given merely for the purpose of exciting the female, or with the deliberate intention of having intercourse while in a state of insensibility.

The following article upon the subject of chloroform from the Canada Lancet and republished in the Chicago Medical Journal, August, 1865, may tend to explain the evidence given by the prosecutrix in some of the cases above cited.

"Chloroform, when administered by inhalation during the period of menstruation, Dr. Kidd affirms, may have the effect of inducing the belief that an assault has been attempted in a criminal way, whilst under its influence. Now, although we cannot, from our own experience, connect with certainty the fact of menstruation with this effect in more than a single instance, we are cognizant of three well-marked cases of the kind occurring in this city, and rumor speaks of several others. We were well acquainted with an elderly gentleman whose wife was so firmly convinced that a dentist had endeavored to take improper liberies with her whilst under the influence of chloroform, that he

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had much difficulty in convincing her that her husband had not left her side during the whole time. We also knew of a young girl who, after an important operation, during which this anæsthetic was administered, positively affirmed that an attempt had been made upon her chastity by the chief surgeon; and from which trouble might have arisen had not other surgeons been present, and her friends been in the adjoining room during its performance.

"The third, a case well known to the profession, in which a respectable woman, whilst menstruating, was put under the influence of chloroform for the abstraction of a tooth, when she afterwards suffered so strongly from a similar illusion that the husband being fully persuaded of its truthfulness, caused the prosecution and imprisonment of the dentist for assault. He was acquitted of the crime, but received a reprimand from the judge for having administered an anæsthetic without the presence of witnesses.

"This case elicited much comment at the time, and has had the effect ever since of rendering our physicians more than ordinarily cautious in the employment of chloroform in the absence of the patient's own friends."

For a further discussion of this question, see Taylor's Medical Jur., pp. 612–625, and authorities there cited. "Sexual connection, therefore, with a person in an unconscious condition, is rape. But to support a conviction there should be first, proof of the *corpus delicti*, which includes intent to use force. And secondly, the reality of the unconsciousness must be proved. *Non omnes dormiunt qui clausus et conniventes habent oculos.*" Whart. & S. Med. Jur., (1873,) § 242; Wharton's Crim. Law, (1874,) § 1147.

Chief Justice McKean, of Utah, in his recent charge to the grand jury, urged them to look carefully into the institution of polygamy and to bring some of the most influential polygamists to the bar of justice; to bear in mind that the doctrine of polygamy goes hand in hand with the murderous doctrine of blood atonement, and to look more particularly after the principals than the agents.—*Albany Law Journal.*

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OPINIONS OF ATTORNEY-GENERAL EDSALL.

ON SUBJECTS RELATIVE TO COUNTY ADMINISTRATION, ETC.

In reply to questions by Jefferson Orr, Esq., State's Attorney of Pike county, he states that it is the rights and duties of State's Attorneys to prosecute or defend all suits brought by or against the county, and that the county board have no authority to deprive him of this authority; nevertheless, the board may if it sees fit, employ and pay other counsel to assist the State's Attorney in relation to such suits.

In reply to Guy S. Alexander, State's Attorney of Crawford county, the Attorney-General states that a court may issue a writ of habeas corpus, *ad testifaciandum*, upon proper applications, and that such writ, being addressed to the warden of the penitentiary, and to the sheriff of the county in which the court is sitting, will suffice to produce the attendance of a convict who is in the penitentiary, and whose testimony may be required in a pending suit.

In reply to R. L. Davis, County Clerk of McLean county, the Attorney-General decides that a justice of the peace may hold his office for four years, and until his successor is qualified. If therefore, at the expiration of the regular term of a justice, his successor does not qualify, the prior incumbent may legally continue to exercise the duties of the office until a successor is elected and does qualify.

In reply to the Board of Commissioners of Greene county, the Attorney-General says, that the compensation of county officers spoken of in section 10, article 10 of the constitution, refers to the salary or pay for the personal services of the offieer, and does not refer to the allowance for clerk hire, which the county board is also authorized to fix. The compensation must be fixed by the board and cannot be changed during his term of office; but the allowance for clerk hire and other expenses may be. Although the fees collected by the officer may not amount to the sum fixed as his compensation, the deficiency cannot be made up from the county treasury, but if the allowance for clerk

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hire, etc., is not met by the fees collected, the deficiency may be paid from the county treasury.

In reply to James S. Cooper, Sheriff and Collector of Madison county, the Attorney-General advises thus: collectors who have collected the extra 7 per cent. of taxes called for by the auditor's levy of 1873, under the railroad aid law of 1869, should retain the same until the legislature make an appropriate disposition of it by law.

This part of the tax was according to the decision of the supreme court collected without authority of law, and strict justice requires that it should be refunded to tax payers, but it requires additional legislation to do this legally. (See *Ramsey* v. *Hoeger*, Ante. p. 112.)

Supreme Court of Iowa.

THE STATE *v.* MERCER.

(32 Ia., 405.)

INTOXICATING LIQUOR—SOCIAL CLUB—CLERK.

A person who acts as the agent or employee of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished for a violation of the prohibitory liquor law, under section 1563 of the revision.

APPEAL FROM MADISON DISTRICT COURT.

Defendant was indicted under the act for the suppression of intemperance (Rev. chap. 64) for keeping a nuisance; in establishing, continuing and using a building and place for the purpose, and with the intent of owning, keeping and selling intoxicating liquors, and in selling such liquors therein. Upon a verdict of guilty, he was fined in the sum of $1,000 and now appeals to this court.

B. F. Murray and *V. G. Holliday*, for the defendant.

H. O'Connor, Attorney-General, for the State.

The opinion of the court was delivered by

BECK, J.—1. From the evidence before us it appears that there existed an organization called, "The Winterset Social Club," the object of which was to supply its members with intoxicating

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liquors, to be used as a beverage. The manner in which this club carried on its operations is not explained, further than that it is shown that defendant had possession of the liquors used, and sold tickets to members of the club, which were exchanged for or given in payment of intoxicating liquors, drank in defendant's house by the members of the club, presenting the tickets. The liquors were served out to the ticket holders and members of the club by defendant. Persons became members by signing their names in some book, (but what were the contents of the book does not appear,) and by buying tickets.

Upon the trial, defendant offered in evidence the articles of association of the club under whose name and organization the enterprise of dealing out intoxicating liquors as a beverage was carried on. The evidence was not admitted on the ground of its immateriality. This ruling is the basis of the first error assigned by the defendant.

The articles of association are not in the abridgment of the record before us. It is therefore not possible for us to determine that they were material and admissible as evidence. But if we are to consider that they were of the purport as claimed by defendant's counsel in their argument, we must conclude that they were correctly excluded by the district court. They appear, by the statement of counsel, to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance; a rather clumsy device, by which the defendant and the members of the "Social Club" hoped to defeat that law and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use.

The fact that, under the arrangement of selling tickets, the members of the club became the owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful. The act of selling the tickets was the sale, in fact, of the liquors. It is confessed that such sales were for the purpose of supplying the liquors to the purchasers to be used as a beverage. Even if defendant did not own the liquors, he would, nevertheless, be guilty of a violation of the law in keeping them.

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Revision, section 1563, is in these words: "No person shall own or *keep*, or be *in any way concerned*, *engaged or employed*, in owning or *keeping* any intoxicating liquors, with the intent to sell the same in this State, (or to permit the same to be sold therein,) in violation of the provisions of this act; and any person who shall so own or *keep*, *or be concerned or engaged*, *or employed*, in owning or *keeping* such liquors, with any such intent, shall be guilty of a misdemeanor," etc., etc.

Section 1559, prohibits the keeping of intoxicating liquors with intent, on the part of the owner thereof, or any other person acting under his authority, to sell the same within the State, contrary to the provisions of this act. If the liquors did not belong to defendant, but to the "club," they were kept by him for the purpose of unlawful sale as the agent or employee of the "club." The sale of the tickets was, in fact, the sale of the liquors, which was for the purpose of their unlawful use. The defendant therefore was guilty of a violation of the law.

According to counsels statement of the purport of the articles of association, they contemplated an enterprise of the character we have just described, and they would not therefore have constituted any defense if admitted in evidence. Their exclusion was therefore proper.

2. An instruction given by the court to the jury is complained of by defendant. It is not presented to us in the abstract, we cannot therefore pass upon it.

3. The sufficiency of the evidence to authorize a conviction is denied, and the judgment is attacked on that ground. We have stated the purport of the evidence, and are clearly of the opinion that the acts of defendant were in violation of the law, and that he was rightfully convicted.

4. It is urged that the punishment is excessive. The fine of $1,000 imposed, is to the full extent authorized by the law. We think that no sufficient reason appears to justify us in interfering with the judgment of the district court.

The law contemplates that certain cases of violation of the law in question may arise, which will demand the infliction of a fine to the extent imposed in this case.

The court below considered this a proper case, for the ex-

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treme penalty of the law. It was better prepared to determine that fact than we can be, and we are required to uphold such determination unless it appears unjust, oppressive, or in violation of the law. It is not made so to appear to us; indeed upon the record we think the fine was wisely and justly fixed at the extreme limit of the law. That the defendant resorted to a device, craftily planned, and boldly executed for the purpose of violating the law, is most patent. He attempted to make the violation of the law respectable, by getting up a "social" organization that would tend to spread with rapidity the appetite for intoxicating liquors, and thus increase the evils of the unlawful traffic in which he was engaged.

His crafty and bold attempt to inaugurate a systematic violation of the law—and men who thus act are the most dangerous to society—we think deserved the severest punishment the law has provided for the offense of which he was convicted.

AFFIRMED.

Circuit Court of McLean County, Illinois.

THE CITY OF BLOOMINGTON v. THE ILLINOIS CENTRAL RAILROAD COMPANY, IN CASE.

1. The provisions of the Charter of the City of Bloomington, and the 10th section of the Charter of the Illinois Central Railroad Co., in relation to street-crossings examined and construed.

2. The ordinances of the city requiring railroad companies to construct crossings at the intersection of their roads with the streets in the city, held valid under the charter of the city passed in 1861 and 1867.

3. A railway company may be required to construct crossings at points where it has paid for its right of way, and properly constructed its road, where there was no street at the time; the public afterwards having acquired a right to construct a street across the line of railway.

4. Whoever cuts through a highway or does any other act for private benefit, whereby a bridge or crossing becomes necessary, is bound to build the same.

5. That under the police power of the State, the City Council of the city of Bloomington, are authorized to require all existing railroads to construct, and properly maintain suitable crossings at all street-crossings, where the same intersect the defendants line of railway.

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I. J. Bloomfield, for the plaintiff.

Williams, Burr & Capen, for the defendant.

Opinion by TIPTON, Circuit Judge:

This is an action to recover the sum of $634.25, paid by the city to Patrick J. Carroll, for work done by him, on a contract with the city in reducing the grade of Chestnut street, in this city, at the intersection of said street, with the line of defendant's road. It is proved that defendant's line of railway was constructed in 1852, and that the same was constructed in a proper manner; and that in September, 1872, such proceedings were had by the city council of the city of Bloomington, that Chestnut street was extended to and across the line of defendant's road, at the point in controversy, that the excavation was necessary in order to make the approaches to the crossing accessible, and that the price paid by the city for the same was reasonable. The liability of the defendant depends upon the construction of the charters of the defendant and plaintiff, and the ordinances of the city. The defendant was incorporated by an act of the legislature, approved Feb. 10th, 1851, laws of 1851, p. 61, which provides that, "said corporation may construct their said road and branches over and across any stream of water, water course, road, highway, railroad or canal, which the route of its road shall intersect; but the corporation shall restore the stream or water course, road or highway, thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness. Whenever the track of said railroad shall cross a road or highway, such road or highway may be carried under or over said track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such road or highway, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such roads or highways as may be deemed requisite by said corporation, unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid, compensation therefor shall be ascertained in the manner in this act provided, as nearly as may be, and duly made by said corporation to the owners and persons interested in such lands. The same

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when so taken, or compensation made, to become a part of such intersecting road or highway, in such manner and by such tenure, as the adjacent parts of the same highway may be held for highway purposes." § 10 of charter. Among the powers conferred upon the city council of the city of Bloomington, by the charter of 1861, section 32 provides, that, "in addition to the powers heretofore mentioned, the city council shall have power by ordinance, * * * to direct and control the laying and construction of railroads, bridges, turnouts, switches, in the streets and alleys, and the location of depot grounds, within the city. To require railroad companies to keep in repair, and to light the streets and alleys through which their tracks may run; and construct and keep in repair and unobstructed suitable crossings at the intersections of their road with the streets, alleys, ditches, sewers and culverts." The charter of the city passed in 1867, provides that: "The city council shall have power by ordinance to direct what streets and alleys in said city may be taken for laying and using for railroad track or tracks; to require railroad companies to keep in repair, and to light the streets and alleys through which their tracks may run, (this provision does not apply to horse railways), and construct, and keep in repair and unobstructed, suitable crossings at the intersections of their roads with the streets, alleys, ditches, sewers and culverts."

On the 8th day of March, 1872, the city council passed the following ordinance:

Sec. 1. That all railroad companies whose track or tracks, enter or pass through the corporate limits of the city of Bloomington, shall construct, erect, build, and keep and maintain, good, safe and sufficient culverts, crossings and bridges, with good and easy approaches thereto, on all public alleys, streets and highways, within the corporate limits of said city.

Sec. 2. If any railroad company shall neglect, or refuse to comply with the provisions of section 1, of this ordinance, it shall be the duty of the street commissioner to give such company notice in writing of the repair, construction or maintainance which is needed, on any culvert, crossing or bridges, at the intersection of such railroad with any alley, street or highway, which is now open or may be hereafter opened within the corporate limits of the city of Bloomington.

Sec. 3. Any railroad company neglecting or refusing to comply with section one of this ordinance, after a twenty days written notice so to do, shall be

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subject to a fine of not less than five dollars nor more than one hundred dollars, for every day they shall neglect or refuse to comply with the same.

This ordinance was aftewards amended as follows:

"That in case any railroad company after being notified as provided in section (2) two and (3) three of an ordinance of the city of Bloomington, approved March 8th, A. D. 1872, shall neglect or refuse to construct or repair (as the case may be) the crossing mentioned in said notice according to the provision of section (1) one of said ordinance, then it shall be lawful for the city to construct or repair the same, and it shall be entitled to recover by any proper action from such railroad company, the value of the labor and materials by it expended, in construction or repairing (as the case may be) such crossing, together with interest thereon, at the rate of ten per cent. per annum, from the date of the completion of the work."

The only question made by this record is: After the railway company had acquired and paid for its right of way, and properly constructed its road at a point where there was at the time no public street or highway, and the public afterwards acquire a right to construct a street or highway across the railroad, can the railroad company be compelled to make such crossing. It is insisted by the counsel for the defendant that a proper construction of the charters of plaintiff and defendant, and the ordinances in evidence, is that the city is only authorized to compel railroad companies to construct and maintain suitable crossings at places where such railroads may cross an existing highway or street, and that if they are to be construed as requiring more, they are so far repugnant to the constitution of the United States. It is conceded that whoever cuts through a highway, or does any other act for a private benefit, whereby a bridge or crossing becomes necessary, is bound to build and maintain the same, and this proposition is fully sustained by authority. See 5 Burrows, 2594; *Rex* v. *Inhabitants of Lindsay*, 14 East. 317; *Rex* v. *Kerrison*, 3 Maule & Selwyn, 526; *Heacock* v. *Sherman*, 14 Wend. 60; *Dygert* v. *Schenck*, 23 Wend. 446; *Regina* v. *Isle of Ely*, 69; English Com. Law R. 826; *The People on the relation of the City of Bloomington* v. *Chicago and Alton Railroad Co.*, Supreme Court Ill., Jan. term, 1873; same case Jan. term, 1874; but these cases have no direct application to this case.

The provision of the charter of the defendant, above cited, is but confirmatory of the principles announced in the above cases, and was not intended to apply to cases where the

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highway is located after the construction of the railroad. *St. Louis, Jacksonville and Chicago Railroad Company and The Chicago and Alton Railroad Company* v. *The Springfield and North-western Railroad Company.* Chicago Legal News, vol. 6, page 143; for the reason that the highway in controversy was located after the construction of the railroad. That the provisions of the city charter and the ordinances of the city in evidence are broad enough, and were intended to apply to cases like the present, cannot I think, well be doubted; and, if this construction be the correct one, there are new burdens imposed upon existing railroads within the city. And it has been held, that the legislature cannot impose new burdens on a corporation where the right to do so is not retained in the charter. *Commonwealth* v. *Penn. Canal Co.*, 66 Pa. St. 41; (5 Am. R. 329;) *Washington Bridge Co.* v. *The State*, 18 Conn. 53; *City of Erie* v. *Erie Canal Co.*, 9 P. F. Smith, 174. But the principles announced in these cases necessarily require some qualification, at least in this State. See *G. & C. U. R. Co.* v. *Appleby*, 28 Ill. 289; 25 Ill. 142. Upon the authorities, it is clear to my mind, that the charter of the city and the ordinances in evidence cannot be sustained, unless within the police power of the State; to require the existing railroads to make suitable crossings and approaches thereto, upon all existing and prospective highways. And in order to determine this question, it is necessary to examine the cases falling within such power, and by parity of reason determine the case at bar. Dillon on municipal corporations, p. 136, says: "Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants, are comprehensively styled, 'Police Laws or Regulations.' * * * These regulations rest upon the maxim *salus populi suprema est lex.* * * * It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *sic utere tuo ut alienum non leadas.*" This police power has been sustained in numerous instances in placing burdens and restrictions upon individuals and corporations. In requiring them to build sidewalks in front of their lots; to build party walls; to build partition fences. Restraining the erection of wooden

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buildings; in preventing the importation of Texas and Cherokee cattle; in controlling the burial of the dead. The *Town of Lakeview* v. *The Rose Hill Cemetery Co.*, 6 Chicago Legal News; and in controlling the manufacturing of offal, &c., into fertilizing material. See the case of the *Chicago Fertilizing Co.* Restraining the building of a wharf in a stream beyond a certain line, though it did not interfere with navigation. And existing railroads have been required to fence their track. *O. & M. R. R. Co.* v. *McClelland*, 25 Ill., 142; and to ring a bell, *G. & C. U. R. Co.* v. *Loomis*, 13 Ill., 549; *G. & C. U. R. Co.* v. *Appleby*, 28 Ill., 289. To construct cattle guards at crossings, *Thorpe* v. *R. & B. R'y Co.*, 27 Vermont, 140. Regulating the speed of trains in cities, towns and villages. *Toledo, Peoria and Warsaw Railway Co.* v. *Deacon*, 63 Ills. 91. In this case the court say: "The State has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the State, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of these franchises by corporations, must yield to the public exigencies and safety of the community." Affirming 25 Ill., 140, and 13 Ill., 548. In the case of *P., Ft. W. & C. R'y Co.* v. *Metheven*, the supreme court of Ohio, 21 Ohio St. 590, in speaking of the statute of that State, of March 25, 1859, requiring that every railroad company within two years after the passage of the act, to construct and maintain good and sufficient fences, and also to make and maintain a sufficient number of *suitable crossings* for the accommodation of the public, say: "That this statute was intended as a police regulation for the protection of life and property, is not doubted." In the case of *English* v. *New Haven and Northampton Railroad Co.*, 32 Conn. 240, would seem to sustain the same doctrine. In this case the defendant was authorized to build a railroad into New Haven, which they did to the satisfaction of the city council, and afterwards the legislature passed the following law: "Said court of common council shall have supervision over all

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bridges crossing railroads in said city, and may from time to time order the widening or repairing of said bridges, in such manner and within such times as in their judgment may require." And afterwards the city council passed an ordinance requiring the railroad company to widen a bridge on Temple street, which they refused to do, because as claimed, the law was unconstitutional, as impairing the obligation of contracts, and taking private property without just compensation. But the court, per Butler, J., say: "We are all satisfied that the claim of the defendant is not well founded. First, Because the act did not contemplate any thing which could impair any obligation of that contract, or deprive the defendant of the full enjoyment of any chartered privilege, or take their *property* for public use, within the meaning of either constitutional limitation."

Redfield, in his work on Railways, vol. 2, p. 444, in speaking of this case and the statute says: "But it seems to us, upon general grounds, that the statute in question was nothing more than the exercise of ordinary legislative powers in maintaining the police of the State." In the case of *New Albany Northern Railroad Company* v. *Brownell* et. als., 24 New York, 345, it was held, that under the statute of that State authorizing the construction of highways across railroad tracks without compensation does not violate the constitutional provisions against taking private property for public use, or impairing the obligations of contracts, and that the title which a railroad corporation acquires to its track is qualified as being taken for public use, and subject to the exercise, by the legislature of all the powers to which the franchises of the corporation are subject. It cannot be said, I think, that the provision in the charter of the city above cited, were passed hastily, for the reason that the legislature of 1869, Laws of 1869, p. 312, § 1, provides "that hereafter all the railroad road-crossings of the public highways of this State, outside of the corporate limits of the cities and villages, the several railroad companies of this State, shall erect, construct and maintain the same, and the approaches thereto within their respective rights of way, so that at all times they shall be safe as to the lives of persons and property." This act was amended by making the same to apply also to all streets.

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See § 46, Hurd's Stat. p. 609; and this legislation would seem to have met the approval of our supreme court, see *C., B. & Q. R. R. Co.* v. *Payne*, 59 Ill., 534; and *The People ex. rel. City of Bloomington* v. *C. & A. R. R. Co. supra.*

It is clear to my mind upon a full review of the authorities that it was the duty of the defendant to make the crossing, public safety requires this, and such requirement brings the case within the police power of the State. See also, *St. L., J. & C. R. W. Co.* and *C. & A. R. R. Co.* v. *The Springfield & N. W. R. R. Co.*, 6 Legal News, 143, may be regarded as confirming this doctrine.

It being the duty of the defendant to make the crossing, it was its duty to make the approaches thereto. *Tolland* v. *Wellington*, 26 Com., 575; *North Staffordshire Railway Co.* v. *Dale*, 8 Ellis & Blackburn, 835; *Rex* v. *Inhabitants of West Riding, of the County of York*, 8 East. 278; *State* v. *Gorham*, 37 Maine, 451; *Board &c.* v. *Strader*, 3 Harrison, N. J., 108. And the defendant not having complied with this requirement of the law (which at this time applies to both streets and highways) the city, under the ordinances in evidence might cause the same to be constructed, and sue for and recover the same. *State* v. *Gorham*, 37 Maine, 437.

JUDGMENT ACCORDINGLY.

Court of Appeals of Kentucky.

ABSTRACT.

DUNN *v.* BRADLEY, GARRARD CO.

DUTY OF ATTORNEYS AT LAW IN ADVISING CLIENTS.

LINDSAY, J.—This was a suit by an attorney against his client for fees, one item of the account was in the words: "Legal advice to place your property beyond the control of your creditors, $300." The proof shows that the advice, as charged, was to enable the client to convey fraudulently, his property beyond the reach of his creditors.

Held—That an attorney is in one sense an officer of the court, and owes a duty to it and to the law, as well as to the

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client. He violates this duty in advising or instructing those applying to him for counsel or instruction to attempt a dishonest evasion of the law.

His official oath binds him to discharge the duties of his office "according to law."

Fidelity to the client neither requires nor excuses advice leading to a violation of the law, nor the commission of an act or acts, involving moral turpitude. When such advice is given, or when the client is instructed as to the means by which his creditors may be defrauded, the attorney is not discharging the duties of his office "according to law," but in direct violation of it, and a promise upon the part of the client to pay for such advice will not be implied, nor will an express contract to pay for it be enforced.

Supreme Court of Illinois.

TOLEDO, WABASH AND WESTERN R. R. Co. *v.* T. J. REYNOLDS, FOR THE USE OF L. MARX, Error to Washington County.

1. Process of garnishment may issue upon judgments in the circuit court to any county in the State.

2. That the filing of a plea in a proceeding in garnishment by the garnishee to the jurisdiction of the court, is not a full appearance. It is therefore. Held, to be error, to render final judgment on sustaining a demurrer to a plea to the jurisdiction.

3. The judgment in such case should be a conditional one, as upon default and a *sci. fa.* should be ordered returnable to the next term of the court to show cause why the judgment should not be made absolute.

O. T. Reeves, for the plaintiff in error.

P. E. Hosmer, for the defendant in error.

The opinion of the court was delivered by

SCOTT, J.—In 1872, L. Marx recovered a judgment in the circuit court of Washington county, against Reynolds, on which execution was issued and returned, no property found, Marx then sued out a garnishee process against the railroad company, which was served on its agent in McLean county. A plea to the jurisdiction of the court was filed to which the court sustained a de-

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murrer. The plaintiff in error having elected to stand by its plea, the court rendered final judgment against it for the amount of the judgment in favor of Marx against Reynolds. It is insisted that a proceeding in garnishment is an original suit, and hence it is claimed it was not lawful to serve the garnishee process upon an agent of the company out of the county where the original suit was pending. The statute under which these proceedings were had seems to authorize the judgment creditor to have process directed to any county where any person may reside who may have money or effects in his possession belonging to the judgment debtor. The statutory provisions are very broad and liberal. It is declared that it shall be lawful for the court or justice of the peace before whom the original judgment had been rendered to cause any person or persons supposed to be indebted to, or to have any effects or estate of the defendant, to be summoned forthwith to appear "before said court or justice of the peace, as garnishee or garnishees." R. S. 1845, sec. 38, p. 307.

The remedy given by the statute is not limited, any person whether resident or not of the county in which the original judgment is rendered, may be summoned as a garnishee. It is not material therefore, to determine whether a proceeding in garnishment is to be regarded as an original suit, or a proceeding in the nature of execution of the original judgment. In either view, a court of general jurisdiction by virtue of the statute giving the remedy, may send its process to any county in the State, where the garnishee may be found. There is no difference between natural persons or corporations in this regard. Either may be summoned as garnishee. It is true, that a justice of the peace can not send process beyond the territorial jurisdiction of such a court as defined by the statute. The judgment in this case was obtained in the circuit court, and no reason is perceived why it could not send process of this character to any county in this State.

The fact the garnishee is to be summoned to appear before the court which rendered the original judgment, excludes the idea that the proceeding can be commenced in any other county. Any other construction would defeat the intention of the legis-

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lature in the passage of the act. Manifestly it was the intention to give a remedy in exactly such cases as this, to facilitate the collection of debts.

The second error, however, is well assigned, the filing of the plea to the jurisdiction, was not a full appearance on the part of the company. Hence, it was error to render final judgment on sustaining the demurrer to the plea, to the jurisdiction of the court. The judgment should have been a conditional one, as upon default, and a *scieri facias* should have been ordered, returnable to the next term of the court, to show cause why the judgment should not be made absolute. R. S. 1845, sec. 16, p. 67.

For the error indicated, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Supreme Court of Illinois.

THOMAS COATES v. THE PEOPLE, &c.

1. The indictment in this case, charges that the three persons named, with a stick of wood which each severally had, and held in their several right hands. inflicted the mortal wound causing death. The grounds of the objection to the indictment is that the act is physically impossible. Held, that there is no physical impossibility in the act charged, however improbable it may be.

2. That the plea of guilty admits that the act was committed in the manner charged in the indictment.

3. The statute in relation to accessories, at or before the fact construed. and held, that all accessories at or before the fact are principals, and to be punished according, and must be indicted as principals and not otherwise.

4. That it might be advisable to describe the circumstances of the offense as they actually occurred, but this is not indispensable.

5. Under this indictment, proof that either one of the defendants struck the fatal blow with the weapon described, and that the others were accessory, at or before the fact, would be sufficient to sustain a conviction of all of them as principals, and that there would be no variance between the proof and the allegation in the indictment affirming. *Baxter* v. *The People*, 3 Gill. 368.

6. In all cases where a person shall be convicted of manslaughter, the statute expressly empowers the jury to fix the time the person convicted shall be confined in the penitentiary; which may be for natural life, or for any number of years to be designated in the verdict, and that the court on a plea of

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guilty, has the power to sentence the defendant for life or any number of years to be designated in its judgement.

Van Buren Denslow, Counsel for plaintiff in error.

James K. Edsall, Attorney-General for the people.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff in error and two others, were indicted for murder. A motion to quash the indictment was overruled. Afterwards he entered a plea of guilty of manslaughter, and the court sentenced him to the penitentiary for the period of ten years.

The first point made is, the indictment is void for ambiguity. It charges that the three persons named with a stick of wood which each severally had and held in their several right hands, inflicted the mortal wound causing death. The ground of the objection is that the act is physically impossible. We cannot concur in this view. There is no physical impossibility in the act charged, however improbable it may be. What is to prevent all three of the persons accused having hold of the same stick with their several right hands at the instant the fatal blow was inflicted. The plea filed admits it was done in the manner charged, and there is nothing in the nature of the act that compels us to hold a mortal wound cannot be struck by three persons in that way.

But there is another view that is conclusive of the objection urged. Our statute makes all accessories at or before the fact principals, and provides they shall be punished accordingly. They must be indicted as principals and not otherwise. It might be advisable as was said in *Baxter* v. *The People*, 3 Gilm. 368, to describe the circumstances of the offense as they actually occurred, but this is not indispensable. As in the case at bar, proof that either one struck the fatal blow with the weapon described, and that the others were accessory at the fact, would be sufficient to sustain a conviction of all of them as principals. There would be no variance in such a case between the proofs and the allegations in the indictment. This is the construction given to the statute in *Baxter* v. *The People*, and we see no reason to depart from it.

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The remaining point is, as to the jurisdiction of the court to pronounce sentence upon the accused for a longer period than eight years imprisonment, on a plea of guilty of manslaughter.

In all cases where a person shall be convicted of manslaughter, the statute expressly empowers the jury to fix the time the party found guilty shall be confined in the penitentiary, which may be for natural life, or for any number of years, to be designated in the verdict. Laws 1859, section 1, p. 125.

It is denied the court upon plea of guilty entered, possesses a like power with the jury in such cases. We think it has, in *Muller* v. *The People*, 31 Ill., 444, it was declared, that so far as the first section of the act of 1859, provided a different punishment for a person found guilty of manslaughter, it was repugnant to the 29th section of the act of 1845, and to that extent, the latter was repealed by the former act.

It is insisted, however, the authority given by the act of 1859, to fix the punishment for the crime of manslaughter for a period greater than eight years imprisonment, is to the jury, and not the court. If the position assumed was tenable, the act of 1845 having been repealed, there would be no power in the court, on a plea of guilty of manslaughter, to pronounce any sentence upon the accused; such is not the law. By the 183d section of the Criminal Code, (Rev. Stat of 1874, p. 410, § 424,) the court on a "plea of guilty," has the same power in all cases as the jury, and may "proceed to render judgment and execution thereon," as if the party "has been found guilty by a jury."

It was so ruled in *Hamilton et. al.* v. *The People*, (Jan. term, 1874,) and that decision must control this.

No error appearing in the record, the judgment must be affirmed.

JUDGMENT AFFIRMED.

It is held by the supreme court of Massachusetts, that an indictment against three persons jointly, for an attempt to commit larceny from the person of the fourth, which charges that the three with felonious intent, put "their hands" into his pocket, may be sustained by proof that all three were participating in the act, though only one of them put his hand into the pocket. *Commonwealth* v. *Fortune*, 105 Mass. R., 592.

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Supreme Court of Illinois.

PETER ROBERTSON v. WILLIAM R. JONES et. als., Appeal from Madison.

This was an action of trespass to recover for the value of coal taken from plaintiff's land, and the only question made is, as to the measure of damages. Held, that in trespass, the measure of damages is the value of the coal after it is dug on the land, or the value of the coal at the mouth of the pit, less the cost of conveying it after dug, from the mine to the mouth of the pit.

The opinion of the court was delivered by

CRAIG, J.—This was an action of trespass, brought by appellant, in the circuit court of Madison county, against appellees, to recover damages for coal taken from the mines of appellant.

It was conceded upon the trial, that appellees had dug and taken from the mine of appellant, seventeen thousand seven hundred bushels of coal, and the only question presented by this record is as to the correct measure of damages for the coal taken.

The circuit court on the admission of evidence held, that appellant was only entitled to recover the value of the coal in the mine before it was taken out, and at the request of appellees instructed the jury as follows:

"The court instructs the jury, that if they find for plaintiff, the measure of damages will be the value of coal taken in the ground as shown by the testimony."

It is said by Kent, in volume 2, p. 362: "It was a principle settled as early as the time of the years books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber."

In *Bells and Church* v. *Lee*, 5 Johns. 348, it was held, that where one person entered upon the land of another, and cut down trees, and sawed and split them into shingles and carried them away, the conversion of the timber into shingles did not change the right of property.

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In case of *Davis* v. *Easely*, 13 Ill., 198. It was held by this court: if one enter upon the land of another, cut down trees and convert them into boards, the owner of the trees can maintain replevin for the boards.

This proceeds upon the principle that the owner of property wrongfully taken may pursue and recover it by any appropriate action, so long as it can be identified.

From these authorities it follows, that had appellants instituted an action of replevin when the coal had been dug and placed on the bank, he could have obtained the coal, or had the coal been demanded at any time, after it was taken from the bank, and while in possession of appellees, appellant could have in an action of trover recovered the value of the coal in its then condition, at the time demand was made and the property converted, in either event appellees would have obtained nothing for digging the coal or other expenses connected therewith.

This, however, is an action of trespass, no demand was ever made for the coal, or action brought to recover the specific property.

Upon principle, what should be the proper measure of appellant's damages? When the coal was dug from the bed, it became and was converted by appellees from its original condition into a chattel. The moment it was severed from the freehold, a right of action then existed in favor of appellant, if he could maintain replevin, and recover the coal severed from the land; and upon this there can be no doubt; upon the same principle, in an action of trespass he has the right to recover the value of the coal after it is on the bank, or he could recover the value of the coal at the mouth of the pit, less the cost of conveying it after dug from the mine to the mouth of the pit.

This rule is founded on justice, and seems to be sustained by the authorities.

In *Martin* v. *Porter*, 2 Mees. & Wels., Lord Abbinger said: "It may seem a hardship that the plaintiff should have this extra profit of the coal, but still the rule of law must prevail."

In Hilliard on Torts. pp. 419–420, the rule as declared by the author is: "in trespass for severing and carrying coal from the plaintiff's mine, the proper measure of damages in respect

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to the coal taken, is its value as soon as it existed as a chattel, that is as soon as severed."

See also, *Martin* v. *Porter*, 5 M. & W. 353.

From these views it follows that the rulings of the circuit court in the admission of evidence, and in the instruction given for appellees, was contrary to the doctrine here announced; and was error, for which the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Bainbridge on Mining, page 444, American edition, says: "There is no more fertile cause of annoyance to mining owners than the working out of bounds. For it is a serious trespass in itself, often involving much loss of property; but it may occasion irremediable disasters to mining works. The premature bursting of barriers may occasion the most fatal effects, both to property and to life. For this a very inadequate remedy is provided. The remedy at law, is an action of trespass. The measure of damages in such cases is the full value of the minerals as soon as they are severed from the freehold, if they have been brought to the day and disposed of, the amount may be estimated by deducting the costs of transit from the place of working, from the value at the mouth of the pit or level. This does not preclude any other mode of fixing the amount according to the above rule. But no deduction can be made for the costs of working, nor for the dues of the lessors." In the case of *Maye et. als.* v. *Tappan et. als.*, 23 California, 306, it was held, that where a trespass is committed by entering upon and taking away the gold bearing earth from a mining claim, and the same is not done wilfully or with a malicious intent, and the action is brought for an injury to the land itself, the true measure of damages is the value of the gold bearing earth at the time it is separated from the surrounding soil and becomes a chattel, and that in estimating the damages, the expense of separating the earth from the gold, after it is moved to the place of washing, is to be deducted from the value of the gold.

If, however, a demand is made for the possession of the gold after it is separated from the earth, and an action is then brought for a conversion of the chattel, the measure of damages would be the value of the gold detained. From this case and the principal case, it would seem that where the action is trespass, and brought for an injury to the land itself, the true measure of damages would be as stated in the principal case. But it is equally clear from the authorities, that if a demand is made for the possession of the coal, while in the possession of the party at the mouth of the pit, and the demand should be refused, that then an action of trover can be maintained, and the measure of damages would be the value of the coal at the mouth of the pit, at the time of the demand and refusal.

When the action is brought for an injury to the land itself, then as stated by Mr. Bainbridge, in his work above cited, the action must be trespass; but when the action is to recover the value of the chattel, the action should be

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trover; or if the party could identify the coal, he might maintain replevin. See also, *Goller* v. *Pelt*, 20 Cal. 481; *Coleman's Appeal*, 62 Penn. St., 252–278; *Bennett* v. *Thompson*, 13 Iredell (Law), 146; *Lykens & Co.* v. *Dock*, 26 Penn. Stat. 232; *Fisher* v. *Pimbley*, 11 East. 188.

The mining interest in the northwest is just beginning to be developed, and we publish the principal case, and the note of authorities, for the reason that the question involved is a practical one, not only in this State but throughout the country. It is very important that parties interested in the great mining interests of this country should know their rights, as settled by the courts; and it is equally important that the adjoining land owner should understand his rights.

Supreme Court of Pennsylvania.

FREDERICK ALTWATER *v.* F. WOODS AND MARY D. HIS WIFE.

ADJOINING OWNERS OF LAND—DUTY OF SUPPORT.

Error to district court of Alleghany county. Case.

Action to recover for damages to a lot and buildings thereon, belonging to Mary D. Woods, occasioned by digging away the soil of the adjoining lot.

Altwater and Mary D. Woods were owners of adjoining lots in the city of Alleghany, which were several feet above the grade of the street on which they fronted. The defendant, Altwater, undertook to reduce his lot to the grade of the street, and in doing so, he commenced his excavations four feet from plaintiff's line, sloping out to ten feet at the bottom.

Notwithstanding this, the soil of plaintiff's lot fell into the excavation, carrying down the fence, some shrubbery, and a chicken house. The defendant contended, that if he used due care in grading his lot, he is not liable for plaintiff's injury, and asked the court to submit that question to the jury. This the court refused, and charged the jury that if the injury was occasioned by the defendant's excavations, he is liable, whether the work was done with due skill and care or not.

Verdict and judgment for plaintiff.

Burton and *Whitesell*, for plaintiff in error, cited—7 Watts, 476; 8 W. & S. 40; Pitts. Reports, 127; 8 B. Mon. 453; 12 Mass. 220; 17 Johns. 92; 8 Johns. 421; 3 M. & W. 220; 12

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Watts' 342; 12 Wend. 309; 13 Watts, 261; 9 B. & C. 725; 6 Benj. (N. C.) 1; Com. Dig. Action in Case of Nuisance, 6; 2 Roll's Ab. Trespass, 1 pl. 1; 3 B. & Ad. 871; 17 Johns. 92; 4 Paige, 169; 1 Ad & E. 493.

J. A. Emory and *W. D. Moore*, for defendant in error.

Oct. 19, 1874. Judgment affirmed. *Per Curiam.*—*Weekly Notes of Cases.*

Supreme Court of Michigan.

FIRE.

Mortgage—When Statements in Application not true—Effect of Advertising Property for Sale.—The plaintiff made application for insurance, and told the agent of the company that the encumbrance on the property was a mortgage of near $5,300, and said nothing about the accrued interest, and the mortgage was for $325 more, and the agent filled out the application, stating the mortgage to be for that amount. *Held*, that this was not such a misrepresentation as would make the policy void.

That this is not a case of waiver. The plaintiff simply accepted such papers as had been prepared for him by the agent, after giving all the necessary information to enable them to be drawn as they should be. The court has several times held that a company which has thus acted, with a full notice of the facts and received a party's money, under circumstances leading him to suppose he was receiving in consideration thereof a valid contract of indemnity, must be held estopped from repudiating the contract afterwards. That when insurance is taken upon mortgaged property, and the insurer is notified of the mortgage, and of course understands, proceeding may at any time be taken to foreclose it, and when the mortgage is overdue when the insurance is taken, it would be an unjust construction to hold that by the mere commencement of foreclosure proceedings the policy would be an unjust construction to hold that by the mere commencement of foreclosure proceedings the policy would be annulled. This condition refers to proceedings "had, commenced

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or taken for a sale," and applying it to the foreclosure of a mortgage by advertisement, the words seemed to be satisfied by confining them to actual offer of the premises for sale, at the time specified in the notice. *State Insurance Co.* v. *Wm. W. Lewis.* — *Western Ins. Review.*

Supreme Court of Pennsylvania.

KERR, Adm'r. *v.* SHRADER.

VENDOR AND VENDEE OF CHATTEL—AUCTION SALE—ENTIRE CONTRACT—WARRANTY—MEASURE OF DAMAGES—RE-SALE—PRACTICE.

Error to district court of Allegheny county.

At an adminstrator's sale held by Kerr, Shrader purchased a mare and a horse, they having been put up separately, and knocked down to him on separate bids. Discovering afterwards that the horse was unsound, he refused to receive him, but offered to receive and pay for the mare; but Kerr refused to deliver one unless he would receive and pay for both, and, Shrader persisting in his refusal, they were, after due notice, again put up and sold for less than the amount of his bid.

This action was brought to recover the loss on the re-sale and expense of keeping the animals in the mean time.

The court charged that the sale of the horse and mare to defendant constituted but one contract, and plaintiff was not bound to deliver one without the other (1st and 6th assignments); that, in the absence of an express warranty, representations of soundness made by the plaintiff at the sale constituted no defense, unless they found that he fraudulently concealed defects known to him, which could not be discovered by the exercise of ordinary care and caution (2d, 3d, and 5th assignments); and that if plaintiff used due and proper care as to time and manner of second sale, the true measure of damages was the difference between defendant's bid and the amount realized at the second sale, together with cost of keeping and other incidental expenses (4th assignment.)

Verdict for plaintiff, and judgment thereon.

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Marshall and *Patterson*, for plaintiff, cited—on 1st and 6th assignments—*Hilliard on Sales*, (2d ed.), 184; *Story on Sales*, 238, 598; *Emerson* v. *Hales*, 2 Taunton, 68; 1 Starkie, 345; *James* v. *Shore*, 4 B. & A. 77; *Roots* v. *Donner*, 1 Nev. & M. 661; *Johnson* v. *Johnson*, 8 Bos. & Puller. 162; *Ashcom* v. *Smith*, 2 Penna. R. 220; *Miner* v, *Bradley*, 22 Pick. 457. On 2d, 3d, and 5th assignments—*Story on Contracts* (2d ed.), 347; *McFarland* v. *Newman*, 9 Watts. 57.

Lazear and *Montook & Bro.*, for defendant, cited—On 1st and 6th assignments—*Coffman* v. *Hampton*, 2 W. & S. 377; *Tompkins* v. *Haas*, 2 Barr. 74; *Mills* v. *Hunt*, 17 Wend. 333. On 2d, 3d, and 5th assignments—*Heilbrunner* v. *Wayte*, 1 P. F. Smith, 259; *Eagan* v. *Call*, 10 Casey, 236.

Oct. 24, 1874. Judgment affirmed. *Per Curiam.*—*Weekly Notes of Cases.*

To appear in 63d Illinois.

MARRIAGE CONTRACT.

On the trial of an action for the breach of a contract to marry, the court gave this instruction: "In this suit the jury may infer a promise to marry to have been made by the defendant; 1st. from the conduct of the parties; 2d. from the circumstances which usually attend an engagement to marry; as visiting, the understanding of friends and relatives, preparations for marriage, and relatives preparations for marriage, and the reception of the defendant, by the family of Sarah Robinson, as a suitor." Held, that the instruction was erroneous. It does not follow, that because a man is a suitor of a lady, and visits her frequently, a marriage relation exists.

On the trial of a case for a breach of a marriage engagement, the court permitted the plaintiff to prove by a witness what plaintiff had told the witness about the marriage engagement, in the absence of the defendant. Held, that such testimony was hearsay, and that the court erred in its admission. *Walmsley* v. *Robinson.*

On a trial of an action for breach of promise of marriage,

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the court below permitted the plaintiff to prove promises of marriage, made at a time when both parties were married and known to be so by each other. Held that the court erred in admitting such testimony. *Paddock* v. *Robinson*. In this case the court examined the cases of *Wild* v. *Harris*, 7 C. & B., 999; *Millnard* v. *Littlewood*, 5 Exch., 775, and *Daniel* v. *Bowles*, 2 C. & P., 553, and distinguished from this case.

Rule in Shelly's case.

The rule in Shelly's case is: "When the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance there is a limitation either mediately or immediately to his heir or heirs of his body, the word "heirs" is a word of limitation of the estate and not of purchase. The remainder is immediately executed in possession in the ancestor so taking the freehold."

So where land was conveyed by deed to A, "during the period of her natural life, and to her heirs forever thereafter," it was *held*, that as the deed conveyed a life estate to A, which is a freehold estate, and the immediate remainder was therein limited to her heirs, all the requisites of the rule in Shelly's case were fulfilled, and A took the fee in the land. *Brisbain's Case.*

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HON. W. C. P. BRECKINRIDGE OF KENTUCKY.

We have received the very elaborate and able argument of the Hon. W. C. P. Breckinridge before the court of appeals, of Kentucky, in the matter of Colonel R. W. Wooley, of the Kentucky bar, for contempt. The case is of such magnitude and of such deep public interest, that it should receive more than a passing notice. Col. Wooley, a distinguished lawyer, sprang from a race of eminent lawyers, whose names have not only become historic in that State, but throughout the nation; and, through a long practice in his profession, has shown himself worthy of the name he bears, is arraigned at the bar of one of the ablest courts in the nation, for contempt, for language used in a petition for a rehearing in a case before that court. The argument of Mr. Breckinridge is masterly and exhaustive of the subject. The power of the court to disbar an attorney, and forfeit his franchise as a lawyer, because of contempt and nothing else is denied, and a long line of decisions cited as sustaining the views of counsel, and the demarkation between contempt and malpractice clearly stated and seemingly maintained by authority. The argument consists of seventy-six pages, and is truly worthy its distinguished author, and accumulates an amount of learning on the subject of contempt to be found nowhere else within our knowledge. In discussing Morris's case, (63 North Carolina, 408,) the counsel, on page 72 of his argument says: "It is true that the court, before rule, citation, or response, suspended all the members of that bar, until the return of the rule; but it is also true that he discharged the rule upon a simple disavowal of intention to offend; and it is further true that the carpet-bag court of North Carolina is the only appellate court in America, so far as I can find at any time, which has ever held or intimated, that a court could disbar or suspend an attorney for contemptuous words merely, whether written or spoken."

We make this quotation for the purpose of calling attention to the expression "*carpet-bag* court of North Carolina." The court referred to is the court of last resort in one of the States of this Union, and as such, are the opinions of the court to be regarded. If the opinion in the particular case is unsound, the fact can be demonstrated either by authority or reason, and no court would perceive the fallacy of the opinion more readily or with a keener perception than the learned court to whom the learned counsel was submitting the argument: and we cannot believe that counsel whose reputation cannot be hemmed in by state lines in addressing one of the ablest courts in this country, would wittingly, in speaking of any court, without regard to its jurisdiction or dignity, denominate it a *carpet-bag court*. Sufficient for all courts outside of the State of North Carolina, to know that the court alluded to is the court of last resort in that State, and if the opinions of the court are not sustained by reason or authority let them be disregarded by the courts of the country, as authority; but let the courts and bar, throughout the length and breadth of this broad land, ever speak respectfully of the courts of sister states; giving their opinions such weight as authority, as the ability, industry, and learning of the court entitles them to.

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HEAD-NOTES.

Supreme Court of Ohio, to appear in 24 Ohio Stat.

CRIMINAL LAW JEOPARDY.

1. In a criminal cause, the discharge of the jury without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative.

2. In such case the record must show the existence of the necessity which required the discharge of the jury, otherwise the defendant will be exonerated from the liability of further answering to the indictment. *Himes* v. *The State of Ohio.*

PRINCIPAL AND ACCESSORY.

1. One who, participating in the felonious intent is present, aiding and abetting the commission of a murder or other felony, is a principal, although not himself the immediate perpetrator of the act.

2. The presence, either active or constructive, of the accused at the commission of a felony, is not a necessary ingredient in the offense of aiding, abetting or procuring another to commit it, defined by section 36 of the crimes act. *Worden* v. *The State of Ohio.*

SPIRITUOUS LIQUOR INDICTMENT.

1. The gist of the offense defined by the fourth section of the act of May 1, 1854, to provide against the evils resulting from the sale of intoxicating liquors, is the keeping of a place of public resort where intoxicating liquors are sold in violation of law, and not that the place kept is otherwise of any particular description.

2. Where the place alleged to have been kept by the accused is described as a room, no case of variance is presented, although the proof given in support of the charge shows that the room kept was a cellar or grocery. *O'Keefe* v. *The State of Ohio.*

PRIORITY OF LIENS.

1. The time of the commencement of a term of court is to be determined by the record of the court, in connection with the statute under which the term is held, and parol evidence is not admissible for the purpose.

2. In determining the question of priority between the lien of a judgment and the lien of a mortgage filed for record on the first day of the term, where the record fails to show the hour at which the court met, the session of the court will be presumed to have commenced at 10 o'clock A. M., that being the hour, on the first day of the term, fixed by statute for the return of the *venires* for the grand and petit juries, and at which time the court, where a different hour has not been prescribed, ought to have opened.

3. In a suit by a judgment creditor, to marshal the several liens on real estate, and to distribute the proceeds of the sale thereof among such liens, according to their respective priorities, the fund still being under the control of the court, the fact that in a former suit between two of the defendants, to which the plaintiff was not a party, a decree had been rendered, giving to the junior lienholder priority, cannot be pleaded as an estoppel to preclude the court from awarding to each lien priority according to its merits, the decree in the former suit having been rendered without the presence of the necessary parties, and the fund being insufficient to discharge all the liens.

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THE

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LARCENY IN FOREIGN COUNTRIES NOT PUNISHABLE IN THE UNITED STATES.

The argument in support of convictions in the courts of the States of the Union for larcenies committed in foreign countries, when the property is brought into the United States by the thief, is founded on the well known rule and practice of the common law, that all trials must be had in the county where the offense is committed; and that when property has been proved to have been stolen in one county, and the thief is found with the stolen property in his possession in another county, he may be tried in either county. It proceeds on the legal assumption that when the property has been feloniously taken, every act of removal or change of possession by the thief, may be regarded as a new taking or deportation, and as the right of possession, as well as the right of property continues in the owner, every such act is a new violation of the owner's right of property and possession, and so it may be said at each removal, to be taken from his possession. 2 Russell on Crimes, (7th American edition, 115, 116,) *Comm.* v. *Uprichard*, 3 Gray Mass. 436. But the question that we are now discussing may be regarded as not strictly analogous to the principles above indicated. If the offense is committed any where within the realm of England, in whatever county, the same law is violated, the same punishment is due. The rules of

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evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same.

The same is true of the several States of the Union. A conviction or an acquittal in any one of the counties of the State would be a bar to an indictment in any other county, so that the place of trial in the State is not very material. But a larceny committed in one State and the property carried by the thief into another State, the form of trial and the punishment may be different, but it would seem that such difference could make no legal barrier upon principle, for if it be held to be a continuing larceny the moment the thief enters the border of the State, he violates the law of such State, and he cannot complain that the form of trial is different, or that the punishment is different or greater than the punishment inflicted by the law of the State where the larceny was originally committed. The theory of the common law is, and the constitution of the United States provides, that no person for the same offense, be twice put in jeopardy of life and limb; and the cases holding that a larceny committed in one State and carried by the thief into another State of the Union, may be sustained on the principle that our States are all united under one general government, with one supreme constitution, forbidding a second punishment and fully protecting the thief against a second conviction. The theory upon which this class of convictions is sought to be sustained is, that the legal possession of the goods remains all the while with the owner; and that as soon as the goods arrive within the State, the thief again took them from the possession of the owner. If these theories be true, they are true as a fiction of law only, the facts are otherwise.

But it is not our purpose in this article to discuss the question as to the soundness of this class of decisions, further than the same may tend to throw light upon the question of foreign larcenies. This question very recently arose in the supreme court of the State of Ohio, not yet reported, in the case of *Stanley* v. *State*, in which that court, per McIlvaine, J., say: "At the November term, 1873, of the court of common pleas of Cuya-

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hoga county, the plaintiff in error, William Stanley, was convicted of the crime of grand larceny, and sentenced for a term of years to the penitentiary.

"The indictment upon which he was convicted charged, 'that William Stanley, late of the county aforesaid, on the twentieth day of June, in the year one thousand eight hundred and seventy-three, at the county aforesaid, with force and arms,' certain silverware, 'of the goods and chattels and property of George P. Harris, then and there being, then and there unlawfully and feloniously did steal, take and carry away,' etc.

"The following facts were proven at the trial: 1. That the goods described in the indictment belonged to Harris, and were of the value of one hundred and sixty-five dollars. 2. That they were stolen from Harris on the 20th of June, 1873, at the city of London, in the dominion of Canada. 3. That they were afterward, on the 26th day of same month, found in the possession of the defendant, in said county of Cuyahoga. It is also conceded that, in order to convict, the jury must have found that the goods were stolen by the defendant in the dominion of Canada, and carried thence by him to the State of Ohio.

"Upon this state of facts, was the prisoner lawfully convicted? In other words, if property be stolen at a place beyond the jurisdiction of this State and of the United States, and afterward brought into this State by the thief, can he be lawfully convicted of larceny in this State?

"In view of the free intercourse between foreign countries and this State, and the immense immigration and importation of property from abroad, this question is one of very great importance; and I may add, that its determination is unaided by legislation in this State.

"In resolving this question, we have been much embarrassed by a former decision of this court, in *Hamilton* v. *The State*, 11 Ohio, 435. In that case, it was held by a majority of the judges, that a person having in his possession in this State property which had been stolen by him in another State of the Union, might be convicted here of larceny.

"The decision appears to have been placed upon the ground, 'that a long-sustained practice, in the criminal courts of this

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State, had settled the construction of the point, and established the right to convict in such cases.'

"Whether that decision can be sustained upon the principles of the common law or not, it must be conceded that for more than thirty years it has stood, unchallenged and unquestioned, as an authoritative exposition of the law of this State. And although it has received no express legislative recognition, it has been so long followed in our criminal courts, and acquiesced in by other departments of the government, that we are inclined to the opinion that it ought not now to be overruled; but, on the other hand, its rule should be applied and sustained, in like cases, upon the principle of *stare decisis*.

"Before passing from *Hamilton* v. *The State*, it should be added that the same question has been decided in the same way by the courts of several of our sister states. *The State* v. *Ellis*, 3 Conn. 185; *The State* v. *Bartlett*, 11 Vt. 650; *The State* v. *Underwood*, 49 Maine, 181; *Watson* v. *The State*, 36 Miss. 593; *The State* v. *Johnson*, 2 Oregon, 115; *The State* v. *Bennett*, 14 Iowa, 479; *Ferrell* v. *Commonwealth*, 1 Duvall, 153; *Commonwealth* v. *Collins*, 1 Mass. 116. The same point has been decided the same way in several subsequent cases in Massachusetts.

"The exact question, however, now before us has not been decided by this court; and we are unanimously of opinion that the rule laid down in *Hamilton* v. *The State*, should not be extended to cases where the property was stolen in a foreign and independent sovereignty.

"We are unwilling to sanction the doctrine or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction and a mere fiction, be treated as an offense committed within this State and in violation of the laws thereof. In this case the goods were stolen in Canada. They were there taken from the custody of the owner into the custody of the thief. The change of possession was complete. The goods were afterward carried by the thief from the dominion of Canada to the State of Ohio. During the transit his possession was continuous and uninterrupted. Now, the theory upon which this conviction is

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sought to be sustained, is, that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of the law only. The fact was otherwise. A further theory in support of the conviction is, that as soon as the goods arrived within the State of Ohio, the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it.

"That the right of possession, as well as right of property, remained all the time in the owner is true as matter of law. And it is also true, as a matter of fiction, that the possession of the thief, although exclusive as it must have been in order to make him a thief, is regarded as the possession of the owner, for some purposes. Thus, stolen goods, while in the possession of the thief, may be again stolen by another thief; and the latter may be charged with taking and carrying away the goods of the owner. And for the purpose of sustaining such charge, the possession of the first thief will be regarded as the possession of the true owner. This fiction, however, in no way changes the nature of the facts which constitutes the crime of larceny.

"What we deny is, that a mere change of place by the thief, while he continues in the uninterrupted and exclusive possession of the stolen property, constitutes a new 'taking' of the property, either as matter of fact or of law.

"Larceny, under the statute of this State, is the same as at common law, and may be defined to be the felonious taking and carrying away of the personal property of another. But no offense against this statute is complete until every act which constitutes an essential element in the crime, has been committed within the limits of this State. The act of 'taking' is an essential element in the crime, and defines the act by which the possession of the property is changed from the owner to the thief. But the act of 'taking' is not repeated, after the change of possession is once complete, and while the possession of the thief continues to be exclusive and uninterrupted. Hence, a bailee or finder of goods, who obtains complete possession without any fraudulent intent, can not be convicted of larceny by reason of any subsequent appropriation of them.

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"We fully recognize the common-law practice, that when property is stolen in one county, and the thief is afterward found in another county with the stolen property in his possession, he may be indicted and convicted in either county, but not in both. This practice obtained notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The reason for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offense. We are entirely satisfied, however, that the right to prosecute the thief in any county wherein he was found in possession of the stolen property, was not asserted by the crown, because of the fact that a new and distinct larceny of the goods was committed whenever and wherever the thief might pass from one county into another. His exemption from more than one conviction and punishment makes this proposition clear enough. The common law provided that no person should be twice vexed for the same cause. It was through the operation of this principle that the thief, who stole property in one county and was afterward found with the fruits of his crime in another, could not be tried and convicted in each county. He was guilty of one offense only, and that offense was complete in the county where the property was first 'taken' by the thief, and removed from the place in which the owner had it in possession.

"When goods piratically seized upon the high seas were afterward carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, 'because the original act—namely, the taking of them—was not any offense whereof the common law taketh knowledge; and by consequence, the bringing them into a county, could not make the same a felony punishable by our law.' 13 Coke, 53; 3 Inst. 113; 1 Hawk., c. 19, sec. 52.

"The prisoner was charged with larceny at Dorsetshire, where he had possession of the stolen goods. The goods had been stolen by him in the island of Jersey, and afterward he brought them to Dorsetshire. The prisoner was convicted. All the judges (except Raymond, C. B., and Taunton, J., who did

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not sit) agreed that the conviction was wrong. *Rex* v. *Prowes*, 1 Moody C. C., 349.

"Property was stolen by the prisoner in France, and was transported to London, where it was found in his possession. Parke, B., directed the jury to acquit the prisoner on the ground of the want of jurisdiction, which was done. *Regina* v. *Madge*, 9 Car. & P. 29.

"A similar decision was made in a case where the property was stolen in Scotland and afterward carried by the thief into England. 2 East P. C. 772, c. 16, sec. 156.

"This rule of the common law was afterward superseded, in respect to the United Kingdom, by the statutes of 13 Geo. 3, c. 31, sec. 4, and 7 and 8 Geo. 4, c. 29, sec. 76, whereby prosecutions were authorized in any county in which the thief was found, in possession of property stolen by him in any part of the United Kingdom.

"In *Commonwealth* v. *Uprichard*, 3 Gray, 434, the property had been stolen in the province of Nova Scotia, and thence carried by the thief into Massachusetts. The defendant was convicted of larceny charged to have been committed in the latter State. This conviction was set aside by a unanimous court, although two decisions had been made by the same court affirming convictions, where the property had been stolen in a sister state, and afterward brought by the thief into that commonwealth. Without overruling the older cases, Chief Justice Shaw, in delivering the opinion of the court, distinguished between the two classes of cases.

"The following cases are in point, that a State, into which stolen goods are carried by a thief from a sister state, has no jurisdiction to convict for the larceny of the goods, and *a fortiori* when the goods were stolen in a foreign country:

"In New York: *People* v. *Gardner*, 2 Johns. 477; *People* v. *Schenk*, 2 Johns. 479. The rule was afterward changed in that State by statute. New Jersey: *The State* v. *Le Blanch*, 2 Vroom, 82. Pennsylvania: *Simmons* v. *Commonwealth*, 5 Binn. 617. North Carolina: *The State* v. *Brown*, 1 Hayw. 100. Tennessee: *Simpson* v. *The State*, 4 Humph. 456. Indiana: *Beall*

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v. *The State*, 15 Ind. 378. Louisiana: *The State* v. *Reonnals*, 14 L. An. 278.

"There are two cases sustaining convictions for larceny in the States, where the property had been stolen in the British Provinces: *The State* v. *Bartlett*, 11 Vermont, 650, and *The State* v. *Underwood*, 49 Maine, 181. In Bartlett's case, the principle is doubted, but the practice adopted in cases where the property was stolen in a sister state was followed, and the application of the principle thereby extended. Underwood's case was decided by a majority of the judges.

"After reviewing the cases, we think the weight of authority is against the conviction and judgment below. And in the light of principle, we have no hesitancy in holding that the court below had no jurisdiction over the offense committed by the prisoner.

"The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offense, was committed within the State of Ohio and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal of the goods alleged in this case to have been stolen, was at a place beyond the limits of the State, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original 'taking' and the original asportation of the goods by the prisoner must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant before they were brought into this State was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortuous. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was *stolen* in Canada by the prisoner.

"By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this State? Certainly not. The criminal laws of this State have

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no extra territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this State.

"Shall the question whether or not the 'taking' of the property by the prisoner was a crime in Canada be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of facts of which Stanley was found guilty, was in violation of the laws of Canada, but not of this State; and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this State, were essential elements in his offense; therefore, no complete offense was committed in this State against the laws thereof.

"I have no doubt the legislature might make it a crime for a thief to bring into this State property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offense. But that offense would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the *common law*, without reference to any other law or the laws of any other country.

"It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this State has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

"Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in viola-

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tion of the rights of the owner; but our criminal courts have no jurisdiction over offenses committed against the sovereignty of foreign and independent States."

In the case of *Comm.* v. *Uprichard*, 3 Gray, 434, after a very elaborate review of the authorities, the supreme court of Massachusetts held, that the bringing into that commonwealth by the thief, of goods stolen in one of the British Provinces, is not larceny in that State. It may, I think, be conceded that the constitutional provision would be a protection against a second conviction, as between the States of the Union. But what protection has the party that on serving out his punishment inflicted by the State, that on his return he may not be arrested and punished for the original felonious taking, thus violating all our notions of right, and indirectly violating one of the fundamental provisions of the Federal constitution. Take the case of Stanley, above cited, what protection could the United States have given him against a conviction in the courts of Canada, had the supreme court of Ohio sustained the conviction. I apprehend that no remedy could have been afforded him by the State of Ohio, or the general government. Nor could he plead the same, necessarily, as a bar to the prosecution. Reverse the question: suppose a man in Illinois, Indiana or Ohio, commits a larceny, takes the property to Canada, and is there arrested and punished in accordance with their law for the offense; and on his return to his native State is arrested and put on trial for the same offense, can it be said on principle, that he has been punished for a violation of the law of the State in the original taking. In my judgment the cases of Stanley and Uprichard, cited *supra*, are decided right on principle, and should prevail in all the States; and that the case of *The State* v. *Bartlett*, 11 Vermont, 650, and *The State* v. *Underwood*, 49 Maine, 181, are untenable. The Vermont court doubted the principle, but adopted the cases where property is stolen in a sister State; and the Maine case was decided by a divided court, upon principle and authority. A larceny committed in a foreign country cannot be punished in the States of the Union.

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Supreme Court of Illinois.

JAMES G. STOWE v. WILLIAM F. FLAGG, et. al.

1. A corporation can not be created by agreement of parties, and can only be created by legislative enactment.

2. The act relating to the formation of manufacturing companies, &c., corporation laws of 1857, Laws of 1857, page 161, examined and construed, and held, that in order to the creation of such corporation, that when the certificate described in the first section of the act shall have been filed in the office of the clerk of the court, and a duplicate thereof filed in the office of the Secretary of State, and he shall issue his license, the parties, &c., and their successors, shall constitute a body corporate, &c.

3. Stock is essential to the existence of a manufacturing company under the statute, and there must be at least three stockholders.

4. That until such proceedings are had the proposed corporate property is not changed to corporate property.

The opinion of the court was delivered by

SHELDON, J.—The question here presented is, whether there was a corporation, and the property involved had become corporate property. There clearly was no corporation on the 10th of August, 1870, or until the 12th of November, 1870, the time the license was issued. A corporation can not be constituted by the agreement of parties, it can only be created by legislative enactment. The third section of the act relating to the formation of manufacturing, &c., corporations, Law 1857, page 161, provides that: "When the certificate (described in the first section) shall have been filed as aforesaid, with the clerk of said court, and a duplicate thereof filed in the office of the Secretary of State, the said clerk shall issue a license to the persons who shall have signed and acknowledged the same, on the reception of which, they and their successors shall be a body corporate and politic in fact and in name, by the name stated in such certificate," &c.

The certificate here was signed and acknowledged August 10th, 1870, but it was not filed in the office of the Secretary of State until Oct. 5th, and in the office of the circuit clerk Nov. 11th, and the license was not issued until Nov. 12th, 1870.

The signers of the certificate did not become a body politic and corporate under the statute by the making of the certificate,

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but it was only upon the reception of the license that there could have been a corporate existence.

Stock is essential to the existence of a manufacturing corporation under the statute. The integral parts of such a corporation are at least three stockholders. Sec. 4 of the act referred to provides that, "The affairs of such company shall be managed by a board of not less than three, nor more than seven directors, who shall be stockholders therein; and also, who shall after the first year be annually elected by the stockholders," &c.

There was here no stock book opened, no stock issued, and as we regard it no stock subscribed for or taken in the corporation. There is no pretense of any subscription for stock more than the written agreement of August 10th, 1870; and appellees' counsel insists upon that, as a stock subscription. That agreement so far as it relates to stock is evidently all executory, to take and put in stock at a future time. It does not purport that the parties thereby take or put in any stock. An undertaking to subscribe a certain amount of stock when books shall be opened, does not make the subscriber a stockholder, liable to call. *Thrasher* v. *Pike Co. R. R. Co.*, 25 Ill. 393.

The agreement is a mutual one between these persons, containing various provisions and stipulations; each one's agreement being in view of all the several provisions being carried into effect as herein designated. This agreement could not be binding upon the subsequent corporation to be formed under the statute.

Stowe and Mathewson did not agree to take respectively, $25,000 and $10,000 of stock, absolutely, but the former was to put in his machinery, tools, etc., as stock, for $25,000 stock in the company, and Mathewson was to transfer his patents, etc., at the sum of $10,000 stock in the company.

The twelfth section of the act provides that nothing but money shall be considered as payment of any part of the capital stock of any such company, except real estate and personal property necessary to carry on the business of the company, which shall be received as payment, only at a cash valuation, to be fixed by the appraisement of two disinterested persons, etc. Now supposing the corporation, when it has occasion to act with

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reference to stock should follow the statute and only take the property at its appraised value, which should be less than the arbitrary values fixed upon it in the agreement, clearly the parties would not be bound to put in their property at the appraised value. The same may be remarked as to the building and land to be put in as stock by Flagg.

This agreement too, assumes to appoint the parties to it, officers in the company for a year; such as president and treasurer, superintendent and manager, and agent; and to fix the amount of their salaries. Suppose the corporation should see fit to choose its officers and other ones for itself, or to diminish these salaries, would then the agreement as to stock be obligatory?

No action whatever with regard to the subject of stock has been had since the making of the agreement.

Under section 9 of the act, stockholders are liable to the extent of their stock. How much stock have the parties, and especially Flagg?

He has evidently, the chief interest in the concern. The agreement does not fix the amount of the stock he was to take, nor has it been ascertained as yet according to the agreement or otherwise, what his stock would be.

We cannot regard the agreement of August 10, as a subscription for stock. No one by the agreement was to put in any cash stock, except Flagg, $10,000. But he seems to have actually put in the company as stock, no money or anything else. Mathewson, testifies that whatever money Flagg ever paid in, was all credited to Flagg's account, as money loaned to the company. He did not understand that Flagg ever paid in any money as on his stock. On filing his answer, Flagg tendered with it, for the company his warranty deed for the land and buildings, but never before. The testimony shows that Flagg did not carry out the contract fully in respect to completing the buildings within the time agreed upon, and this was a cause of difference between him and Stowe.

It was claimed by Flagg, that the sum at which Stowe was to put in his machinery, tools, &c., was too high, that the latter made false and fraudulent representations as to their value, they

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not being open to inspection at the time, and that their true value was not to exceed $15,000. These subjects of dispute existing in regard to the performance of the agreement, further go to show the impropriety of regarding such an agreement as an actual subscription for stock, and there was a necessity of a future adjustment, in order to ascertain the amount of stock which was to be subscribed for.

All seems to have been done under the articles of association of August 10th, and before there was any corporate existence, by means of the issue of the license, Nov. 12. The by-laws were adopted and the officers elected previously.

The transfer of property which Stowe made, was August 15, and though business was subsequently carried on under the name of Empire Machine Works, that name had been adopted and used prior to August 10.

A certificate was made and filed, and a license procured, and no further action would appear to have been taken in a corporate capacity.

In our view, the property here involved, has never been changed into corporate property, but belongs to those parties as an association of individuals under their written agreement of August 10, 1870, and we are of opinion the appellant is entitled to maintain his bill for relief.

The decree will be reversed and cause remanded for further proceedings.

DECREE REVERSED.

Common Pleas of Schuylkill County, Pennsylvania.

HUGHES v. GALLANS.

The contracts of an infant at common law cannot be enforced except for necessaries. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages.

Motion for a new trial.

Opinion by

WALKER, J.—The evidence in this case was that the defendant employed Patrick Christopher Hughes, a small boy, to drive horses for him attached to his boat on the Schuylkill Navigation

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Canal, during the summer of 1871. The wages of the boy the defendant refused to pay, and suit was therefore brought by his next friend, James Hughes.

It appears on the trial that Thomas Gallans, the defendant, was also a minor, under age of 21 years, and this was the ground of the defense, the contract not being for necessaries furnished. The court upon the request of the defendant instructed the jury that if the defendant was a minor at the time the contract was made, and the services were performed, the plaintiff could not recover.

Was there error in this?

No doubt this is a case of hardship, but the hardship of special cases has, it is said, run away with the law, and it has been found a dangerous expedient to fritter away a principle to sustain an exception.

The contracts of an infant at common law cannot be enforced except for necessaries: 1 Blackstone Com. 466, and notes by Judge Sharswood; *Curtin* v. *Patton*, 11 S. & R. 305; *Clemson* v. *Bush*, 3 Binney, 413; *Penrose* v. *Curren*, 3 Rawle, 351; *Sliver* v. *Shelback*, 1 Dallas, 165; *Brown* v. *McCund*, 5 Sanford, 228; 1 vol. American Leading Cases, 307; 2 vol. Smith's Leading cases, 653, 5th American Ed.; *Norris* v. *Vance*, 3 Richardson, 164; *Conroe* v. *Birdsall*, 1 Johns. 127; *McGinn* v. *Shaeffer*, 7 Watts. 412.

And this is so, even though he represented himself to be of age: *Burley* v. *Russel*, 10 New Hamp. 184; *West* v. *Moore*, 14 Vermont, 447; 1 Blackstone Com. 466. See Adams' Equity, 362 and notes.

Legal incapacity cannot be removed by fraudulent misrepresentation, nor can there be an estoppel involved in the act to which the incapacity relates: *Keen* v. *Coleman*, 3 Wr. 299.

Infants are liable for their torts: *Bullock* v. *Babcock*, 3 Wend. 391; *Vasse* v. *Smith*, 6 Cranch, 226. But not when the contract is stated as an incident of a supposed tort: *Wilt* v. *Welsh*, 6 Watts, 9; *Keen* v. *Hartman* et ux., 12 Wr. 497.

Infants are liable for necssaries: *Rundel* v. *Keeler*, 7 Watts. 237; *Com.* v. *Hantz*, 2 Pa. Rep. 333; 1 American Leading Cases, 300 to 303 and notes.

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The term necessaries is a relative one, and what are necessaries must be determined by the age, fortune, condition, and rank in life of the infant: 1 Black. Com. 466 and note, 14 (Sharswood's Ed.)

Moneys loaned for repairs are not necessaries: *West* v. *Gregg*. 1 Grant, 53. And there may be no recovery for necessaries when the infant has a guardian: *Guthrie* v. *Murphy*, 4 Watts. 80: *Wailing* v. *Toll*, 9 Johns. 141; *Angel* v. *McLellen*, 16 Mass. 28.

And in an over supply a tradesman acts at his peril: *Johnson* v. *Lines*, 6 W. & S. 80.

Whether the person be a minor or not is a question for the jury: 1 Black. Com. 466 and notes; 1 M. & S. 738.

And in doubtful cases, it is better to admit the evidence and judge of its effect afterward: *Allen* v. *McMaster*, 3 Watts. 181.

Though an infant therefore, be not liable for his contract, he is nevertheless answerable in an action on the case for damages: *Fitts* v. *Hall*, 9 New Hamp. 441; *Wallace* v. *Morss*, 5 Hill, 391.

The rule is therefore discharged.—*Legal Chronicle.*

Supreme Court of Illinois.

SUSAN MERRITT *v.* WILLIAM F. YATES et. al., Error to Champaign.

1. Acknowledgment of a deed by a married woman, when sufficient to convey land of which she owns the fee.

2. A certificate of acknowledgment when signed, and the deed delivered to the grantee, the officer cannot amend the same, nor execute a new certificate for the purpose of giving validity to the deed.

Cunningham & Webber, for plaintiff in error.

Sweet & Day, for the defendant in error.

The opinion of the court was delivered by

WALKER, J.—Plaintiff below having introduced evidence to maintain her title, defendant introduced and read in evidence a deed from her to him, for the same premises. To the reading of which, plaintiff excepted, on the grounds that it was insufficiently acknowledged to pass to plaintiff's title, she being a

married woman, and the owner of the premises when the deed was executed. And the objection is urged in this court as grounds of reversal.

This is the certificate of acknowledgment to which objection is made:

"I *Jackson Lewis, a Justice of the Peace*, in said county, in the State aforesaid, do hereby certify that *Susan Merritt and James Merritt her husband*, personally known to me as the same persons whose names *are* subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument in writing as *their* free and voluntary act, for the uses and purposes therein set forth."

"And the said ——, wife of the said ——, having been by me examined, separate and apart, and out of the hearing of her husband, and the contents and meaning of said instrument of writing having been by me fully made known and explained to her, and she also by me being fully informed of her rights under the homestead laws of this State, acknowledged that she had freely, and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned; and also, all her rights and advantages under and by virtue of all laws of this State relating to the exemption of homesteads, without compulsion of her said husband, and that she do not wish to retract the same. Given under my hand and — seal this *seventh* day of *December*, 18—."

According to the authority of the cases of *Tully* v. *Davis*, 30 Ill. 103; *Gove* v. *Cathen*, 23 Ill. 641, and *Owen* v. *Robins*, 19 Ill. 553, this acknowledgment was insufficient to pass plaintiff's title. The last paragraph of the certificate does not state who, or whose wife was made acquainted with the contents of the deed and privily acknowledged the same. Nor does it state who was the husband. But it is urged that mere grammatical inaccuracy should not vitiate. That is no doubt true, but no matter how ungrammatical the language, so that it can be clearly seen what is intended to be expressd. But that must appear without mere inference or conjecture. Had the justice said that the parties appeared and acknowledged the deed, we might conjecture that it was the grantor or grantee, but the acknowledgment would not so state, either grammatically or ungrammatically. In such a case it might be conjectured that the officer was well qualified to discharge this and every other duty, and that he was careful and painstaking in the discharge of his duty; but even if that were proved, it would not make such a certificate what is required by the statute, and we presume that no one

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would contend that such an acknowledgment would be sufficient. And in principle and in fact, in what consists the difference, if substance is considered.

Whilst many of the forms and ceremonies anciently required in alienations have been dispensed with, still we have not yet reached the point where all substance may be omitted in instruments transferring title to real estate. As land has become more a matter of commerce, the forms of conveyances have been simplified and cheapened; but still, reasonable certainty of description of persons and property to be affected must appear. It must be certain that the persons executing acknowledged the deed, and that the *feme covert* who joins in the deed acknowledged its execution, and not that she executed the deed and some other *feme covert* had it explained to her, and acknowledged that she relinquished her dower or conveyed her estate.

It is also contended that the subsequent certificate written by the justice of the peace on the deed, some years after the first was made, cured the defective certificate, although the deed was not acknowledged. We have been referred to no precedent for such action, and we would confidently expect that none could be found. Anciently such acknowledgments could only be taken in open court, and entered on the records of the court in proceedings tedious, expensive, and encumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskilled persons, and the title to property held by married women, was guarded with such care as only to permit it to be divested by the judge of a court of record. Justices of the peace, and the other enumerated officers, have however, under our laws, been entrusted with the power to take and certify such acknowledgments, and where in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by the judgment of a court of record.

It is said that courts of record permit amendments to their records, sheriffs to amend their returns, and compel officers, by mandamus, to perform legal duties. There is no rule more rigidly enforced than that the opposite party must have notice in all cases of amendments of records in matters of substance, and the amendment here is of the very essence of the convey-

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ance itself. And it is true that the court, in a proper case and on notice to the opposite party, will permit the sheriff to amend his return. *O'Connor* v. *Wilson*, 57 Ill. 226. But we are aware of no statute or common-law practice which authorizes or in any manner sanctions the right of justices of the peace to amend their records, after they have once been made. To allow him to make alterations and changes in his record, at will, and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been entrusted to the higher courts, and cannot be exercised by these inferior jurisdictions.

The case supposed, of compelling a justice of the peace who refuses to make any certificate of an acknowledgment, by mandamus, is not parallel to this case. Here the justice of the peace, at the time, granted his certificate, and it imparts verity. We do not concede that the circuit court has power to compel a justice of the peace, by mandamus, to correct a judgment when entered by mistake for too large or too small a sum, or to correct a certificate of acknowledgment in which a mistake has occurred. Such a process cannot be used to correct judgments of inferior courts, and the acknowledgment and certificate take the place of the judgment of former times, and imports verity, and cannot be contradicted any more than can a judgment.

It may be that the carelessness of the justice has produced hardship and wrong, but that is not a ground for violating rules that have governed the purchase and sale of real estate from the organization of our State. The defendant must be left to his action against the justice or on the covenants in the deed, or any other remedy he may have in law or in equity. The deed was improperly read in evidence, and the judgment of the court below must be reversed and the cause remanded.

JUDGMENT REVERSED.

The question of the conveyance of land is becoming more important every year, and in the West, where land is frequently conveyed, this branch of the law is very important to every practising lawyer, hence the importance of the foregoing case; but it must be observed that the deed in question was executed and delivered prior to the act of 1869, and is applicable only to conveyances executed prior to that time. For a full discussion of the act of 1869 and 1872, see the case of *Simmons* v. *Hervey*, Ante page 20. and note. See also, *Trustees of Schools* v. *Davidson* et. al. Ante page 164.

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Supreme Court of Illinois.

GEORGE THOMAS v. THE BOARD OF TRUSTEES.

1. That the Mechanics' Lien Law of this State does not apply to labor alone, or materials furnished to the State, in the improvement of its real estate. That the entire scope of the act refers to individuals and private corporations.

2. That the institution is a State institution, belonging to and entirely controlled by the State; and that the property is not subject to the lien of mechanics or material men.

3. In this case the petition fails to set out the terms of the contract with the first or principal contractor, and that the sub-contractor was within the power of the principal contractor, to make it so as to bind the owner, or the property, or that there was a sufficient fund due the principal contractor to pay plaintiff, nor that plaintiff had performed his contract. *Held*, that the petition was defective.

J. A. Kennedy, for plaintiff in error.

Cunningham & Webber, for defendant.

The opinion of the court was delivered by

WALKER, J.—It is urged in affirmance of the decree of the court below, that the entire property and management of the University belongs to and is under the control of the State, and that the mechanics' lien law does not apply to the case. When that law is considered it is apparent that it contains no language from which it can be inferred that the legislature intended its provisions to apply to labor done for, or material furnished to the State, in the improvement of its real estate. The entire scope of that act refers to individuals, and to private corporations. And it would violate the long and ever recognized canon of interpretation, that laws which refer to inferiors cannot be held to embrace superiors; or, laws referring to individuals do not embrace the State. This law, only in terms, applies to persons, and can not be held to embrace the State, or the general or local public, or even those who hold property of the State in trust, and are improving it for, and under the direction of, the State. It then follows that if this is a State institution, belonging to, and entirely controlled by the State, at its expense, that the workman has no lien on the property for his pay.

Is this University, then, a State institution, or is it a pri-

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vate corporation? It has been largely endowed with funds by the State, received by donation for the purpose, from the general government. The act by which it is organized places its control under the authority of the State. The governor is required to appoint, and the senate to confirm the trustees who control the institution, except the governor and superintendent of public instruction, are made *ex-officio* members of the board of trustees for the management of the fund, and the government of the University. There is nothing in the act, from which it can be inferred that this institution was, in any respect to be a private corporation, either in whole or in part.

It was founded on donations from the general government, the county of Champaign, the Central Railroad, and it may be, from private individuals. These donations consisted of land-scrip from the general government lands, and bonds given by Champaign county; freights by the railroad company. The title to which was transferred to the State, and became the property of the State, to hold in trust for the purposes of the University. And these trustees and officers were appointed by the authority of the State, for its government and control. Private individuals have no interest in or control over it, but it is, in every sense of the term, a State institution. It, with its property, management and control, is entirely under the control of the general assembly, by making subsequent appropriations for the erection of buildings, and to defray expenses, and by expressly prohibiting the board of trustees from obligating the State for the payment of any sum of money in excess of the appropriations thus made. Sec. 3, Acts 1871–2, p. 143. The officers of the incorporation are paid, either directly or indirectly, from funds belonging to the State. All of the interest derived from the funds invested, from rents from real estate, and for tuition paid by pupils or otherwise, belongs to the State, and hence there can be no pretence that the institution is private, or is to be governed by laws relating to private persons or corporations.

Had this body been mixed in its character, and a part had been held by private individuals, and another part held by the State, then the rule would no doubt be different. It has been held that when the State enters into trade or business with pri-

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vate individuals associated together in a corporate capacity, then such organization may be subjected to all of the legal remedies which apply to private corporations. Nor can we infer, from the fact that the board of trustees may sue and be sued, that the general assembly intended that the special and restricted remedy by sueing to enforce a mechanics' lien was intended to be given. That idea is clearly negatived by the provision which expressly prohibits the board of trustees from binding the State for the payment of any sum beyond the amount appropriated. This excludes all idea that the property could become bound by lien or otherwise, for any sum, but that the improvements should be paid out of the appropriation and not by sale of the land or buildings upon which the University was erected. In this, as well as in other particulars, this differs from the case of the *Board of Education* v. *Greenbaum*, 39 Ill. 609. We are unable to perceive in the organization of this body any material difference, such as should distinguish it from the State institutions for the blind, the insane, or the deaf and dumb. We are therefore clearly of the opinion that no lien attached in favor of plaintiff in error for labor performed or materials furnished. But even if it could be held that it did, the petition was substantially defective. It fails to set out the terms of the contract with the first or principal contractor, and that the sub-contract was within the power of the principal contractor, to make it so as to bind the owner or the property, or that there was a sufficient fund due the principal contractor to pay plaintiff in error. Nor does it appear that he had performed his contract.

It can not be held that in case a workman undertakes to perform an entire contract, that he may quit when he chooses, without cause, and enforce a lien for such portion of the work as he may have performed. He has no power to split up an entire demand, and maintain several suits, and enforce several liens. He could not maintain a suit to enforce his lien for each week's wages, and thus harass, and vex with costs the owner and principal contractor. He should perform his contract, unless wrongfully prevented, before he can enforce a lien. Any other construction of the statute would render it liable to be made an engine of oppression, instead of the means of obtaining justice.

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Plaintiff in error, so far as we can see, has a complete remedy by suit under the statute, against the board of trustees and the contractor, by recovering judgment, and by execution thereon. We, for the reasons indicated, must hold that the decree of the court below must be affirmed, which is done.

DECREE AFFIRMED.

In the principal case it is held, that a mechanics' lien can not be created against the Industrial University at Champaign, for the reason that that institution is a State institution, distinguishing the case from the case of *The Board of Education* v. *Greenbaum & Son*, 39 Ill. 609, which was a petition against the Board of Education of the State of Illinois for a mechanics' lien, when it was held that the property of the Normal University is not the property of the State, but is the property of "The Board of Education of the State of Illinois," as a corporation whose charter can not be repealed by the legislature. The corporation may sue and be sued, and unlike a municipal corporation, the only remedy a creditor has against it is by judgment and execution, as in a case against an individual or other corporation, not of a municipal cheracter, and that the building is subject to the claims of a creditor under the law for the enforcement of mechanics' lien. In the principal case the court say: "Plaintiff in error, so far as we can see has a complete remedy by suit under the statute against the board of trustees and the contractor by recovering judgment and execution thereon."

We doubt, whether the court intended to hold that the building and grounds of the University were liable to levy and forced sale. We are of opinion that the court did not intend to hold that a creditor of the University stands on any other or different ground from other creditors of the State.

ELEMENTS OF SUCCESS IN A LAWYER.

We have borrowed an extract from an occasional lecture recently delivered, by special request, before the students of the Harvard Law School, by Hon. Emory Washburn, which may have an interest by way of practical hints, to others than those to whom it was addressed.

"I wish, in this connection, to disabuse the student of some of the false notions which are so generally prevalent among young men while studying law. He has heard the fame of this great advocate or that, and may, perhaps, have been in court when some fluent lawyer was addressing a jury, and been struck

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with admiration at the smoothness of the flow of his language, and the confident, self-satisfied air with which he was occupying the time and attention of the court and jury. And he may, in this way, be led to associate the success of a lawyer with glibness of speech, a strong and confident statement, and a sharp and ready repartee and reply. And when he begins the study of his profession he is oppressed with the fear that he has not these powers at his command, and asks with much solicitude, how he is to acquire them? I know not how many have expressed to me their fear that they would fail, because they lacked the power of speaking 'off hand.' They had, it might be, attempted to make a speech in a club, or an argument in a moot court, and found themselves unable to recall the words in which they had prepared to express what they had thought over and arranged in their minds.

"The trouble with most beginners in attempting to address a club, or a popular assembly, is that they think more of the words they are to use than the ideas they would express. They associate the making a speech with apt and proper language, such language as passes with so many as eloquence, and finding themselves confused and divided in their thoughts, between what they shall say, and the words in which they shall say it, they fail in both. They have not learned that the true secret of eloquence lies in having something to say which one knows, and which he feels, and their better nature speaks for herself. This, of course, assumes that he has a fair share of general knowledge, and a tolerable familiarity with his own language. And if he has, nature, in the case I have supposed, is not at a loss for proper terms, for these are uppermost in his mind. If a man were to see a tragic event in the street, would he be at a loss for words in which to describe it to the next man he should meet, an hour afterwards? If a mother were pleading for her son before a court or jury, does any man suppose she would have occasion to stop to pick up choice words out of Worcester or Webster to make herself understood? Eloquence is a power, in whatever form of language it clothes itself, and it is one of the noblest and most wonderful which God has vouchsafed to man. But it is not to be attained by mere high sounding words, and often makes itsslf

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felt in the plainest and homeliest terms, when heart speaks to the heart.

"It is a rare gift, and fortunately for men as they rise, it is rarely numbered in the common, every-day affairs in which they take a part. Nor is our profession an exception in this respect. And which is ever to be remembered, if the occasion does not inspire eloquence, no mere words can supply it. Such exhibitions degenerate into the ridiculous platitudes of vapid grandiloquence.

"Courts and jurors were never designed for mere displays of rhetoric and fine speaking. They at times give occasion for eloquence of the highest order, but these are as rare as the Erskines and Websters, among the hundreds who crowd the bar. A lawyer's connection with the courts is ordinarily this and nothing more. The client's property, or reputation, or immunity of person, is involved in a complicated inquiry, in which the court or jury are called in to settle certain controverted questions of law or fact, in which analogies are to be applied, testimony weighed, and judgment and good sense appealed to. What the jury wants of an advocate is to help them in getting at the truth, and show them why their verdict should be for one rather than the other of the parties before them. And so long as he does that, they will lend willing attention to what he is telling them, no matter how simple or homely the language may be in which he addresses them. Mere talking, however glib or graceful, is the last thing they want to listen to, and the moment they see that a lawyer is showing off himself, instead of showing up his own or his adversary's case, they let what he says go in at one ear and come out at the other. Any lawyer who knows what it is to deal with courts and jurors would tell you that it is not the showy, fluent advocate, who talks easily, and trusts to his ready wit and quick perceptions in the conduct of his case, which is most to be dreaded as an antagonist. He is not half so formidable as the careful, it may be the slow and plodding, worker who comes into court prepared at all points, and goes in for winning his cause instead of exhibiting himself. Such a man never fails to get the ear of the court and jury, and as rarely fails to carry them with him, if he is right. One of the strongest and

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most successful advocates which the bar of New England has ever produced was Jeremiah Mason. And one thing that made him so was the thorough preparation which he brought to every case in which he was engaged. Nothing could exceed the care and caution with which he made himself master of his facts and guarded his positions against attack or surprise. And yet, when he came to address a jury, his manner was at times even awkward, and as to language, it was much more marked by directness and homely distinctness than any attempt at grace or fine speaking. But no man ever encountered him at the bar, without feeling that he had no ordinary man to grapple with.

"Another fact which I wish to impress upon the mind of the student, in estimating the elements of success in his profession, is the necessity which he will find imposed upon him to gather up for use by study and observation a large and varied stock of practical knowledge. He must—without my wishing to seem extravagant—know something of everything. The subjects of investigation before courts and jurors, in which the lawyer may be called to take a part, are as various as the callings and business of the different men who compose the state. It is the business of a lawyer to investigate, explain, and help jurors to understand whatever questions may arise in the complicated transactions of a community, and to act as interpreter between the different classes of which it is composed. Unless he knows that of which he is to be the organ of explanation to others, he can not even examine his own witnesses, much less cross-examine the witnesses opposed to him. I have known lawyers spend hours and days when preparing to conduct a cause, involving questions of practical skill or science, with men to whom such matters were a specialty, to possess themselves of the details of which they might have occasion to use in making the requisite explanations to the court and jury. But, ordinarily, he has no such chance for preparation. If he has occasion to use such knowledge, he must have it ready at hand, or it comes too late. He may not, therefore, content himself with merely studying *law*. That is to be but one of the elements at his command. He must know something of practical and mechanical science, of business in its various forms and departments, and know how

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to draw rules and illustrations from that great fountain of the law, moral and ethical science, to say nothing of political economy and political science in general. And what is more, he must have these stored up before hand. He can not stop in the midst of a trial or an argument to hunt up and settle elementary principles.

"And while we are upon the subject of the source of a lawyer's power with a court or jury, let me guard you against another proverbial error into which many young men fall—an ambition to be 'smart.' This being smart, in the popular sense in which it is applied to a certain class in the profession, implies much that is attractive, combined with other qualities which a man of self-respect would scorn to make use of—quick and versatile powers, ready wit, which is sure to raise a laugh among the lookers on, and a cunning which excites the admiration of the habitues of a court room, backed up and sustained by an easy virtue, a good share of impudence, and an unscrupulous disregard of means. With certain classes of the community, such lawyers are great men, and so far as notoriety is fame, become famous in their profession. But before a court and intelligent jury it is exactly the reverse. No man is willing to be made a dupe of trick or cunning, and when a jury detects an attempt of that kind on the part of a lawyer, they know not when to trust him, and suspect him even when he is in the right. If there is any place or business in the world in which 'honesty is the best of policy,' it is that of the bar. A lawyer cannot afford to knowingly misstate evidence. He cannot afford to lie to or deceive a jury. He may do it once, and win a cause which he ought not to; but he may thereby lose a dozen, which a more honest lawyer would be sure to gain.

"I should put among the elements and sources of a lawyer's success at the bar, a reputation for honesty, as the one he can least dispense with, and independent of the right or wrong of the theory, should be content to rest the position upon good judgment and sound policy alone."—*Luzerne Legal Register*.

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Supreme Court of Wisconsin.

JOHN HIBBARD et. al. v. THE WESTERN UNION TELEGRAPH Co.

1. This is an action to recover damages for the neglect of the defendant and its servants to transmit the following message from Port Huron, Michigan. to Milwwaukee. Wisconsin: "Buy twenty thousand. seller June. pay telegraph there." It is admitted that the message meant, and would have been understood by plaintiffs agent, to buy twenty thousand bushels No. 2 wheat.

2. Telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy, and against all contingencies; but are held to ordinary care and vigilance in the performance of their duties. and to answer for the neglect and omission of duty of their servants and agents. This rule applies also to night dispatches.

3. The measure of damage discussed and the authorities reviewed, and held that the plaintiff was entitled to recover nominal damages for a breach of the contract.

4. The court below having found the issues for the defendant. and the supreme court holding that the judgment below was wrong, but that the plaintiff was only entitled to nominal damages. court refused to reverse the judgment.

——— for plaintiff.

Finches, *Lynch & Miller*, for respondent.

The opinion of the court was delivered by

COLE, J.—The facts of this case, upon which the questions of law arise, are few and undisputed. The plaintiffs, who were engaged in buying and selling grain in Milwaukee, through their agent, on the 6th of May, 1872, at Port Huron, Michigan. delivered at about 7:25 P. M., to the defendant company for transmission over its line a message directed to their agent at Milwaukee, of the following language: "Buy twenty thousand seller June, pay telegraph there." This message was written upon one of the printed blanks furnished by the company for the transmission of night dispatches, and was sent by the company to its agent at Milwaukee, during the night of the 6th, and could have been delivered to the agent of the plaintiffs by 9 A. M., of the 7th, but was never delivered, and was lost. On the trial no explanation was given, nor excuse shown on the part of the company to account for the non-delivery of the dispatch. It is admitted that the message meant and would have been understood

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by plaintiffs agent, as directing him to buy twenty thousand bushels of No. 2 wheat, deliverable during the month of June. and that he was to pay the expense of sending the dispatch. If the agent had received the dispatch on the 7th, when it should have been delivered, he could and would have purchased wheat at Milwaukee, for the market-price of $1.48 per bushel. Wheat advanced in the market on the 8th to $1.55 per bushel, when the agent sold some at that price. The agent received from the plaintiffs on the 8th. in the afternoon, a letter advising him of the sending of the dispatch. From the 8th of May to the 29th of June, wheat fluctuated in price, and on the last named day, being Saturday, and also being the last day the seller would have had for the delivery of the wheat had a contract been entered into, according to the dispatch, its market price was $1.23¾ per bushel. The contemplated bargain or transaction, was what is termed in the chamber of commerce of Milwaukee, "buying on option," which means that the seller should deliver the wheat sold at any time at his own option in the month of June. The plaintiffs agent, on the receipt of the letter on the 8th of May. took no steps to make the purchase, and no purchase was in fact ever made, as intended when the dispatch was delivered to the company for transmission. The action is brought to recover damages alleged to have been sustained by the plaintiffs in consequence of the non-delivery of the dispatch.

The blanks furnished by the company for night dispatches, and subject to which the message in question was sent, provide that the company will receive messages for all stations east of the Mississippi river to be sent during the night, at one-half the usual rates, on condition, "that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages from whatever cause occurring, and shall only be bound in such case to return the amount paid to the sender."

It is now claimed on the part of the defendant, that this stipulation restricting its liability is valid, and exonerates it from payment of all loss or damages which may result from errors or delay in the transmission, or delivery, or for the non-delivery of a night message from whatever cause occurring. The

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plaintiffs it is said were competent to assent to this stipulation and did assent to it, and are therefore bound by it, having chosen themselves to take the risk of the dispatch reaching its proper destination. If they were not willing to take that risk it is said they should have paid the higher rate, and sent the dispatch under the contract for transmitting day messages, in which case the company would have been responsible for the correct transmission and prompt delivery of the dispatch to their agent.

In the case of Candee against this same defendant, decided at the present term, the validity of this condition exempting the company from liability on account of the negligence of its servants' in the performance of their duty was considered. It was there held, that such a regulation adopted for the purpose of protecting the company against the consequences of the negligence or frauds of its agents, was an unreasonable condition and was void, as against sound public policy. The course of reasoning by which this conclusion was reached will be seen on reference to the opinion in that case, and no attempt will be made to fortify or add to that reasoning here. It is sufficient to say, that upon the admitted facts there was a clear breach of duty by the company in failing to deliver the message which it had undertaken for a valuable consideration to transmit and deliver, and that it must be held responsible therefor. The message was received in Milwaukee, and might and should have been delivered to the agent of the plaintiffs, by 9 A. M. of the 7th, if the employees of the company had exercised due care and attention to the business which they had undertaken to prosecute. For, in the language of the court in *Baldwin* v. *United States Telegraph Co.*, 45 N. Y., 744–751, "while telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy, and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents," and this degree of liability the law imposes upon them as well in the transmission and delivery of a night as a day dispatch. The defendant company was therefore responsible for the neglect or default of its servants to deliver the message, and must respond for whatever damages the

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plaintiffs have sustained by reason of such negligence. And this brings us to a consideration of the important question as to the proper rule of damages applicable to the case. The court below found as a conclusion of law, that no injury had been sustained by the plaintiffs for which the court could compute damages, and ordered judgment for the defendant. In this we think the court was clearly wrong, because the plaintiffs were entitled to recover nominal damages at least, as the consequence of the breach of contract on the part of the company in failing to deliver the message. But are they further entitled to recover the profit on the expected bargain or purchase which was never made, but which it is claimed might have been consummated had the dispatch been properly delivered. It is argued in their behalf that the company is bound to pay for its default, the profit which they might have realized providing their agent had purchased the twenty thousand bushels of wheat for $1.48 per bushel, on the 7th of May, and resold the same on the 8th, when wheat was worth $1.55 per bushel. Is this the true rule of damages applicable to the facts? It seems to us not.

It is a most material fact to be kept in view that no purchase or bargain for wheat was ever made. On the 8th of May, when the agent was informed of the sending of the dispatch, he confessedly took no steps to make the purchase. If the dispatch had been properly delivered on the 7th, and he had made the purchase according to the order of his principals, they would have lost heavily on the contract had they not sold before they actually had the wheat in possession. For on the 29th day of June, when the vendor might have delivered on the contract, wheat was worth in the market 24¼ cents on a bushel less than when the agent would have purchased. Now suppose the company had said to plaintiffs' agent on the 7th, such a dispatch has been received at the Milwaukee office, and has been mislaid or lost, through the carelessness or fault of our employees, but we will assume the contract you were ordered to make, and deliver the twenty thousand bushels of wheat to your principals, of the designated quality, for $1.48 per bushel, at our option in June. And what would have been the measure of damages if the company had made default in the performance of this contract?

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Mr. Sedgwick, lays down the rule on the subject as follows: "When contracts for the sale of chattels are broken, by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered, upon the ground that this is the plaintiffs' real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor. It follows from this rule, that, if at the time fixed for the delivery, the article has not risen in value, the vendor having lost nothing can recover nothing." Sedg. on Damages, p. 260. So that it appears if the company itself stood in the place of the vendor of the wheat and failed to fulfill its contract, the plaintiffs could recover nothing because they could purchase the wheat on the 29th of June, at 24¼ cents on the bushel less than they had agreed to pay. They would therefore not have been injured by the company's default to deliver the wheat on its contract. Now what ground is there for saying that the defendant is in a worse position on account of its failure to deliver the message than it would have been if it had itself assumed the contract, as of the time the dispatch should have been delivered. We confess we see no satisfactory reason for extending the liability of the company beyond what it would have been, had a contract for the purchase of the wheat been actually made with it, and if it really stood in the place of the vendor. But it is agreed if the message had been promptly delivered the agent might have made the purchase on the 7th, and resold on the 8th, and thus realized a profit on the speculation. Even if the company were the vendor of the wheat, the plaintiffs could not recover this loss of profits on a re-sale. That question was expressly so decided in *Williams* v. *Reynolds*, 118 Eng. C. L., 493; and we consider that as a strong authority adverse to the claim of the plaintiffs. That was an action on a contract for the sale of cotton by the defendants to the plaintiff, at the price of 16¾d. per ℔., to be delivered in the month of August. The plaintiff contracted to sell the same quality of cotton to be delivered in the month of August, at 19¾d. per ℔. The

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defendants failed to deliver the cotton sold by them, and the plaintiff was consequently incapacitated from performing his sub-contract, for the sale at a higher price. He claimed damages for a breach of the contract by the defendants, including the loss of profit which he would have realized on the re-sale. But the court held that the proper measure of damages was the difference between the contract price ($16\frac{3}{4}$d. ℔), and the price ($18\frac{1}{4}$d. ℔.), on the last day of delivery, and that the plaintiff was not entitled to recover damages for the loss of profit on his sub-contract. Such damage, the judges in that case say, do not naturally flow from the breach of the contract to deliver; nor is it such as must be deemed within the contemplation of the parties at the time the contract was entered into in case of a breach of it. The case of *Hadley* v. *Bayendale*, 9 Exch. 341, is cited as laying down the true rule: a case which this court referred to with approbation in *Shepard* v. *Milwaukee Gas Light Co.*, 15 Wis. 318. In the Shepard case, Mr. Justice Paine refers to a class of cases where parties contract for articles with reference to use or sale on some particular occasion, and when by reason of want of time, or their situation with reference to the market, they are unable to supply themselves for that occasion in case of failure to deliver, where the difference between the contract price and market price at the time, when they ought to have been delivered, does not completely indemnify the injured party. See *Richardson* v. *Chynowith*, 26 Wis. 656. But the general rule is, where the action is brought by the vendee for a failure to deliver, the difference between the price agreed to be paid, and the market price of the article on the day delivery should have been made on the contract. *Havemyer* v. *Cunningham*, 35 Barb. S. 515; *Hamilton* v. *Ganyard*, 34 do. 204. Now, applying the rule laid down in *Williams* v. *Reynolds*, and *Hadley* v. *Bavendale*, how can it be said that the loss of profit upon a contract which the agent of the plaintiffs might possibly have entered into, but which he never did, naturally resulted from a failure to deliver the message; or could reasonably be supposed to be within the contemplation of the parties as a result of such failure when the dispatch was left with the company to be sent on its line. If the agent had received the dispatch, so as to make

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the purchase on the 7th, what presumption is there that he would have re-sold at a profit, none whatever. "Selling at a profit is not the natural result of buying with an intention to re-sell." Shee, J., *Williams* v. *Reynolds*. For "that depends on circumstances, altogether out of the ordinary course of things." And, therefore, if we presume that the agent would have made the purchase according to the order if the dispatch had been delivered, we cannot presume that he would have sold the next day so as to realize a profit. The breach of contract complained of is the failure to deliver the message, and the recovery should be limited to an indemnification of the plaintiffs for actual loss sustained. Profits upon a contract never made are quite too remote and uncertain to be taken into consideration. Nor can it be said that the "parties may fairly be *supposed* to have contemplated" such profits as are claimed in the damages which might result from the failure to deliver the dispatch. Since this opinion was prepared my attention has been called to the decision of the court of appeals of New York, in *Baker* v. *Drake*, (published in the Albany Law Journal, Nov. 29, 1873,) which in its general reasoning supports the result reached in this case. It is apparent, that in this case, there was a technical breach of contract on the part of the company for which the plaintiffs were entitled to recover nominal damages. But this would be the extent of the recovery. A judgment for nominal damages would not have carried costs, because the action might have been brought in a justice's court. The dispatch was to be paid for on delivery in Milwaukee, but as it was never delivered the plaintiffs were at no expense for its transmission. And while the county court was wrong in not rendering judgment for the plaintiffs for nominal damages, yet in a case like the present, this constitutes no ground for a reversal of the judgment. This point was so ruled in *Lanbenheimer* v. *Mann*, 19 Wis. 519; and the doctrine of that case was approved in *Easton* v. *Lyman*, 30 Wis. 41, and in *Jones* v. *King*, decided at this term. According to this rule, laid down and approved in these decisions, the judgment in the present case must be affirmed.

IT IS SO ORDERED.

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Supreme Judicial Court of Massachusetts.

MARCH LAW SESSION. 1873.

JAMES REDPATH et. al. v. WESTERN UNION TELEGRAPH Co.

1. The blank upon which the message in this case was sent, contained amongst other provisions the provision: "That said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured." The company charging one-half the regular rates, in addition for repeating the message. Held, that one who elects to save the small sum charged for a more extended liability, cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes: and that this principle applies to every stage of dealing with the message.

The opinion of the court was delivered by

CHAPMAN, C. J.—The plaintiffs sent over the defendants line, June 23, 1872, a message directed to "Hon William Parsons, care H. B. Hassier, Owego, N. Y." It was written on the usual blanks furnished by the defendants, a copy of the heading of which is as follows: "The Western Union Telegraph Company. All messages taken by this company subject to the following terms: To guard against mistakes, the sender of a message should order it repeated, that is, telegraphed back to the originating office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message, and the company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same. Not for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured. Not in any case for delays arising from unavoidable interruption in the working of their lines, or for errors in cipher or obscure messages. And the company is hereby made the agents of the sender, without liability, to forward any messages over the line of any other company, when

necessary to reach its destination. Correctness in the transmission of messages to any point on the line of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of this company is authorized to vary the foregoing.

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message. O. H. Palmer, Secretary; (Thos. J. Eckert, General Superintendent, New York;) William Orton, President."

In a separate line immediately above the blank for the message, the following is printed: "send the following message subject to the above terms, which are agreed to."

The plaintiffs did not ask to have the message repeated, which it is agreed would have tended to prevent the error hereafter stated, or to have its correctness insured, and did not pay any extra charge for having the message repeated or insured. Nor did they give the defendant any information other than that contained in the message. The dispatch was not sent to Owego, N. Y., but to Oswego, N. Y., and Mr. Parsons failed to receive the information given in it. This action is brought to recover damages for the failure to send it correctly.

It is immaterial whether the plaintiffs or their agent read the printed document or not. *Grace* v. *Adams*, 100 Mass. 505. It is sufficient that they assented in writing to its terms, and paid for the sending of a message not insured. The question here is, whether the defendants are liable for the errors notwithstanding the agreement.

The case of *Ellis* v. *American Telegraph Co.*, 13 Allen, 226, was quite similar to this. The message was sent, subject to conditions similar to those here stated, and no extra fees were paid for repeating it. It was a direction to send ten men one hundred and twenty-five dollars, "the error was in stating the sum, one hundred and seventy-five dollars." And the arguments for the plaintiffs were similar to those urged for the plain-

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tiffs here. The jury in the court below were instructed that, notwithstanding the terms and conditions set forth, the defendants were bound to make use of ordinary care, attention and skill, and were liable to damages arising from inattention or carelessness in such transmission, either to the sender or to the receiver, according to their respective interests in the message; and that the error in the message was *prima facie* evidence of a want of ordinary care, attention and skill, on the part of the defendants. A verdict was rendered for the plaintiff, which the court set aside, on the ground that the ruling was erroneous. It was held that the liability of the telegraph company was not like that of a common carrier; and the distinction and the reasons of it are stated; and that the printed conditions limiting their liability were reasonable and valid. The error in that case was of the same nature with the error in this case, and did not arise from the state of the atmosphere, or the imperfection of instruments. In the statement of facts in this case, there is nothing from which it can be inferred that the defendants were guilty of fraud or gross negligence; or, that the error was of such a character that the company could not legally contract for their own protection against liability for it, on such terms as the printed conditions contain.

The case referred to, substantially settles this case; but that case does not stand alone. In *Mac Andrew* v. *Electric Telegraph Co.*, 17 C. B., 3, the message was sent subject to the condition that "this company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise." In the transmission of the message which was unrepeated "Southampton" was substituted for "Hull," This was a similar mistake to that made here, and the message went to the wrong town. But the court held that the condition was a reasonable one, and afforded an answer to the action for damages. The same principle is sustained in other cases, *Camp* v. *Western Union Telegraph Co.*, 1 Met. (Ky.,) 165; *Breese* v. *United States Telegraph Co.*, 45 Barb. 274, which was sustained in the court of appeals; *Mann* v. *Western Union Telegraph Co.*, 37 Missouri, 472. These and other cases, generally sustaining the same doctrine, but some of them dissenting

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from it in some particulars, and most of them considering the question fully are found collected in Allen's Telegraph Cases.

It seems to us, that one who elects to save the small sum charged for a more extended liability, cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes, and that this principle applies to every stage of dealing with the message.

JUDGMENT FOR THE DEFENDANTS.

An examination of the decided cases shows that the law applicable to telegraph companies, is in an unsettled condition. There is great harmony in the decisions holding that these companies can protect themselves from loss by contract, such as one set up in the foregoing cases; and that such a regulation is a reasonable one, and amounts to a contract when fairly made. Some of the cases hold, as held in the Redpath case, others holding differently. The supreme court of Illinois in the case of *Tyler, Ullman & Co.* v. *W. U. T. Co.*, 60 Ill. 431, where a similar contract was set up as a matter of defense, say: "Whether the paper furnished by the company on which a message is written and signed by the sender, is a contract or not, depends upon circumstances. In analogous case in this court, *Adams' Express Co.* v. *Haynes*, 42 Ill., 189, and in *Illinois C. R. R. Co.* v. *Frankenberger et. al.*, 54 Ill., 88, it was held, the simple delivery of a receipt to the shipper, is not conclusive upon the latter whether he had knowledge of its terms, and assented to its restrictions, is for the jury to determine, as a question of fact, upon evidence *aliunde*, and all the circumstances attending the giving of the receipt are admissible in evidence, to enable the jury to decide the fact. The receipt given by the company in this case, was declared on its face to be a contract, and was as full for such purpose in the terms employed, as is in the form now before us. It was a question for the jury in that case, but in this case the court undertook to determine the question and decide the fact.

"We think this was error. We do not see why the same rule in this respect should not apply to telegraph companies, as is applied to express companies and railroad companies. In regard to the latter it is always held, whether or not such a regulation was brought to the notice of the shipper, so as to fix knowledge upon him, to be a fact for the jury. *Brown* v. *Eastern R. R. Co.*, 11 Cush. 97. Slight evidence of acceptance or assent to such regulation would no doubt suffice, but it is for the jury to determine." It must therefore be conceded that the settled law of this country is, that telegraph companies may protect themselves from loss by contract. The distinction made by the courts is, as to the evidence of the contract.

The next question, and one on which the decisions are somewhat conflicting, is, as to the effect to be given to such contracts; some of the courts holding that they cannot so contract, as to exonerate themselves from ordinary care and diligence; other courts holding that they may contract against all

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negligence, except such negligence as shall be denominated gross. It is held in the Hibbard case, that telegraph companies are not insurers, but are to be held to ordinary care and diligence. The serious question is, not that telegraph companies may restrict their liability by contract, but the question arises as to the extent they may so restrict their liability. In *True* v. *The International Telegraph Co.*, 60 Maine. 9, (reported in 11 American Reports. page 156, and the note to the case.) *Tyler, Ullman & Co.* v. *W. U. Telegraph Co.*, 60 Ill. 321; *W. U. T. Co.* v. *Graham*, 1 Colorado, 230; (12 American Reports, 136 and note), discuss this subject at length. In the Colorado case the court hold that a telegraph company can not by a notice printed on a blank on which a message is written, say that it will not be liable unless the message is repeated, relieve itself from liability for a negligent failure to deliver a message not repeated, after it was received at the office to which it was addressed. The court say: "The complaint is not that the message was incorrectly sent, or that it was inaccurately taken off the wires at Nebraska city. If this was the gravamen of the action, we might hold with the Kentucky and Massachusetts courts, that it was the duty of the plaintiff to insure its accuracy by having it repeated."

But the supreme court of Illinois, in discussing this subject of repeating messages, in the Tyler case *supra*, say, on page 438: "As a repeating message, and paying fifty per cent. additional therefor, can not recover of the company to the extent of his loss, we are free to say such a contract, forced as we have shown it is upon the sender, is in our opinion unconscionable, without consideration and utterly void." And the court, further on in the same opinion say: "In the first place, modern telegraphy is not now an infant art. It sprang into existence from the teeming brain of one now no more, who had the boldness to attempt to render subservient to the wants of man the most sublime element of nature, and by its mysterious potency, convey ideas, wants and wishes, to the farthest limits of civilization; and with the spread of its kindred element, in its infancy it scarcely ever failed to perform its office. Thirty years have witnessed vast improvements in the art, a higher knowledge of the subtle agent called into use more finished instruments, and also perfect skill in those who operate them; so that, setting aside atmospheric causes, which have not yet been provided against, it may be asserted as an incontestible truth, that give a line of wire, properly established, the most perfect insnstruments and skilled operators who exercise their skill with proper care, a message started at Chicago for New York, is as sure to reach its destination exactly in the words and figures in which it was started, as the lightning is sure to strike the object which attracts it. Intelligent and skilful operators all admit this. There is no reason, the atmosphere being right, and all else right, why a message correctly transmitted along the line to the end of the line, no matter how many hundred miles asunder may be the point of its departure from the point of its reception. If this is so, then the efforts made by the courts to excuse those who undertake this business, should not be imitated or encouraged by this court."

"Telegraph companies must be held responsible notwithstanding the special conditions of such contracts as are

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made by all the companies, for mistakes happening by the fault of the company; such as defective instruments, or carelessness, or unskillfulness of their operators; but not for mistakes occasioned by uncontrollable causes. *Sweatland* v. *Ills. and Miss. Telegraph Co.*, 27 Iowa, 433; Tyler case *supra*. To permit them to contract against their own negligence, would be to arm them with a most dangerous power; one indeed, that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select their agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to these agents their messages, however valuable they may be. Such being the case, public policy as well as commercial necessity, require that companies engaged in telegraphy should be held to a high degree of responsibility. That when a message is delivered to the company, it is bound to transmit it, and transmit it correctly. That they may contract against liability, occasioned by atmospheric and kindred cause, over which the company have no control." *W. E. T. Co.* v. *Graham*, and *Tyler, Ullman & Co.* v. *W. U. T. Co., supra*. That when an error in the transfer of a message occurs, the burden of proof is on the company, to show that the error was occasioned by atmospheric or other cause, over which they had no control. As to the measure of damages, see the principal cases, and the cases above cited, particularly cases cited in note to Graham's case, on page 149, vol. 9, American R. The question of night dispatches arose in the case of *Candee* v. *The W.U.T Co.*, before the supreme court of Wisconsin, unreported, in which the court say: "It is unnecessary to consider this case with reference to the regulations governing the receipt, transmission and delivery of day messages, although such regulations were put in evidence by the company. The message in question was a night message, written upon what is called a 'night-message blank', furnished by the company, and which contained special regulations for messages of that description. The regulations printed upon and constituting the heading of the night-message blank, and underneath and subject to the terms of which the message was written and directed to be sent, are the only ones applicable to such message, or which can be said to have formed the contract between the plaintiff and the company. It does not concern the court, therefore, to examine or consider the reasonableness or validity of the regulations touching day messages, but only those which relate to half rate or night messages, and we shall confine ourselves to the latter.

"All the courts concur, we believe, in holding that a regulation, the design of which is to protect the company from responsibility on account of the gross negligence or fraud of its agents and employees in the transmission or delivery of a message which the company undertakes for a valuable consideration, to send, is unreasonable, against sound public policy, and void. The correctness of the conclusion is as ably vindicated and sustained in the opinion of the court by Breese, J., in *Tyler* v. *The Western Union Telegraph Co.*, 60 Ill. *supra*, as in any case which has fallen under our observation. The same proposition has been frequently affirmed in other cases and by other courts, and is distinctly recognized in *Redpath* v. *Western Union Telegraph Co.*, (supreme court of Massachusetts, April, 1873,) a manuscript copy of the opinion in which has been furnished us by the counsel for the company since this cause was argued and submitted. Ante 371. We do not dwell upon a principle so generally acknowledged and which meets our entire approbation, but proceed to inquire whether such is the purpose of the regulations here in question.

"We think there can be but one answer to the inquiry, and that is that the regulations were intended to secure the company against liability for the injurious consequences flowing from its own, and from the negligence and omissions of its agents and operators in and about the performance of its contract entered into with the sender of the message. The supposed exemption is broad and sweeping, and calcu-

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lated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance or attempted performance of the contract, or for the entire failure to perform it, from whatever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, assert such a doctrine.

"It would seem utterly absurd to assert it. Holding itself out as ready, and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence according to the request of the sender. Such being the attitude of the company and the obligation which it assumes by accepting the payment, the question arising is whether it can at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create, an obligation or duty at one and the same moment, and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one half of the usual rates of transmitting day messages that argument ends, in proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose. If the company promises or binds itself at all for the rate of consideration named, and which it is willing to and does accept, then the smallness of such consideration can not operate to relieve from the promise, or to destroy the obligation thus created. Regarding the regulations in this light, therefore, as well as in that of correct public policy, it is seen that effect cannot be given to them, as a means of protection or escape on the part of the company from all liability for the non-performance of its contract. The regulations can not serve to shield the company from the consequences resulting from the gross negligence or fraud of its officers or agents, or from their entire failure to perform the service, no good excuse for such failure being offered or shown.

"The omission of the operator here to send forward the message during the night was the result of gross negligence and inattention to duty on his part. It was a total failure to perform the contract, in excuse of which no facts whatever were shown or offered by the company upon which the burden of making such proof rested.

"We come now to the question of the measure of damages in this case, and herein we think the court below was in error. We are of opinion that the plaintiff is entitled to recover no more than nominal damages; or, as specified in the regulations, the

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amount paid for transmitting the message.

"There appears to be no division of opinion among the courts, that in contracts of this class the measure of the damages to be recovered for the breach is the same as that which obtains in actions upon contracts in general; the rule for the assessment of which has ever been regarded as currently expressed in the leading case of *Hadley v. Baxendole*, 9 Exch. 341, S. C. 11 Eng. Law and Eq. R., 398. The rule, as there stated, is that where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract, should be either such as may fairly and substantially be considered arising naturally; that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The case and the rule were referred to and approved by this court in *Shepardson* v. *The Milwaukee Gas Light Co.*, 15 Wis. 318, and afterwards followed in *Richardson* v. *Cheynoweth*, 26 Wis. 656.

"It can not be said or assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered according to the usual course of things from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives and who represents the company and may for this purpose be said to be the other party to the contract, can not be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling or unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a breach of the contract on his part.

"In this case the message was in cipher, its meaning wholly unknown to the operator, and no explanation given of its true character and import. It is true that the plaintiff testified, and his was the only testimony on the subject, that the employee to whom he delivered the message, and the other person engaged in the office at the time, knew that the message 'pertained to stock because they knew my business to be that business.' And it is true he likewise testified he informed the boy in the office that it was a telegram which required attention and promptness in the sending, and that he left under belief that his request would be complied with. But these facts, however much they may tend to show negligence in the employe or operator, fail to bring the case within the rule for the assessment of damages above stated. They fail to show that it was made known at the office that the transaction was one relating to the purchase or sale of stocks, or if this had been made known, they fail to show that the agents of the company received any information as to the kind or quality of stock directed to be purchased.

"For all that the operator knew or was informed, it might have been some communication or inquiry concerning stocks from the non-transmission of which no special damage would or could ensue. He cannot be said, therefore, to have contemplated a rise in the value of stock by which the plaintiff became a loser as the probable, or one of the probable or possible results of his failure to transmit the message and consequent breach of the contract. To have put the company in a position of responsibility for the difference in the price of the stock between the opening of the New York stock exchange on the next morning, when the message should have been in the hands of the plaintiff's agent in New York, and the hour half-past one in the afternoon, when the same was transmitted to and reached such agents, it was necessary that the agents or operator of the company at Milwaukee should have known the contents or meaning of the message, either by the same having been written out in plain and intelligible words, or having been otherwise explained to him. It might not perhaps have been necessary to have given a

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full and literal translation, but the value to the plaintiff of the message in a pecuniary sense, if we may be permitted so to speak, or the sum which the plaintiff was likely or liable to lose, or in which he might in the ordinary course of events be damaged in case the message was not accurately and speedily transmitted, ought at least to have been communicated to the agent or operator of the company.

"Counsel for the plaintiff contend, if the agent or operator was not apprised of the nature and importance of the communication, that it was his fault, and that the duty rested upon him to have made inquiry of the plaintiff in this particular. They argue that the plaintiff was not bound to make explanation, but that it was incumbent on the agent or operator to make inquiry, if further information was needed for the protection of the company. If we accept the views expressed by the authors of the treatise upon the Law of Telegraphs, (Scott and Jarnagin), 166 and note, counsel are without authority anywhere in support of this position whilst the decisions and utterances which have come from the bench in numerous instances have been quite uniform and clear against it. We do not feel called upon to examine the cases seriatim nor even to refer to them by name upon this or any other point, since they have all been so conveniently and methodically collected and arranged in Allen's Telegraph Cases. The case of *Rittenhouse* v. *The Independent Line of Telegraph*, 44 N. Y., 263, Allen 570, also relied upon by counsel, turned upon the ground that sufficient appeared on the face of the message to indicate its character and importance, and the courts said if the agents wished to understand it more fully they could have inquired of the senders. In analogy to the rule which prevails on the delivery of goods to a common carrier, where, if his liability is not limited by special notice, and if there are no improper means or artifice adopted by the person who sends the goods, to conceal the nature and value of the contents of the box or parcel so as to deceive or mislead the carrier, the person sending the goods is not bound to make the disclosure unless inquiry is made of him on the subject, the courts might perhaps have held in respect to these messages to be sent by telegraph that the duty of disclosure did not exist except upon inquiry made of the sender by the agents of the telegraph company. Angell on the Law of Carriers, § H. 4. But with regard to these messages in cipher, the signification and purport of which are wholly unknown to the agents and operators, the question would still have arisen whether they should not be looked upon as a means or artifice adopted by the sender to conceal the nature or importance of the communication, and thus have brought such messages within the operation of another rule or principle which exempts the common carrier from responsibility. Angell, § § 258 to 263. The principle which relieves the common carrier on the ground of *concealment* of the owner of the goods, in respect to the nature, amount, and value of them, seems to be that which is most nearly suited to the case or transaction in hand, and, as it is the one which has been thus far acted upon and applied by other courts, we feel no hesitation in adopting it.

"The cause was tried in the court below before the judge, without a jury and all the evidence is certified up. The trial in this court is, therefore, a new or second one, both on the law and the facts, and the judgment of this court is final.

"Another trial in the court below is not to be directed in such a case.

"The judgment appealed from is reversed, and cause remanded with directions to render judgment for the plaintiff for the sum paid by him for the transmission of the message, and that thereupon the costs be taxed and judgment entered therefor in the action as presented by law."

The same question arose and was discussed in the supreme court of Maine in the True case *supra*. See 11 A. R. vol. 11, 156, and note. Repetition of messages. See Graham's case, True's case and Tyler's case *supra*. Delays in the delivery of a message, result from causes altogether different from those which produce mistakes in transmission, and it is reasonable that rules of limitation or exemption should be adopted to the nature of the case.—Scott & Jarnigan, on the Law of Telegraphs, § 113, Graham's case, *supra*.

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In the Circuit Court of Madison County, Illinois.

PATRICK McCORMICK v. THE CITY OF EAST ST. LOUIS.

1. The ordinance of the city of East St. Louis, providing, that the Committee of Ways and Means of the Common Council, "be authorized to adjust and compromise any claims of persons holding certificates of indebtedness issued by the Metropolitan Police Commissioners of the city of East St. Loais," &c., considered, and held void.

2. It is a well established rule of law that where power is given to municipal authorities in express language to become indebted, the terms and purpose of the grant will measure the extent of the power.

3. The provision of the charter held, a restriction upon the power of the council, and that any contract made or attempting to be made, looking to the payment of the Metropolitan Police Scrip as unauthorized and prohibited by the charter.

Opinion by

SNYDER, Circuit Judge.—This is an application made to the St. Clair county circuit court, at the September term, 1874, to enjoin the city of East St. Louis, its mayor, common council, clerk and treasurer, from proceeding under an ordinance passed by said common council on the 4th day of September last.

The ordinance in question provides that the committee of ways and means of said common council "be authorized to adjust and compromise any claims of persons holding certificates of indebtedness issued by the metropolitan police commissioners of the city of East St. Louis, on such terms and conditions as said committee may deem proper; provided, such committee shall not pay more than the amount actually received for such certificates, with interest thereon not exceeding ten per cent. per annum;" and that in all cases where such compromise shall be effected with the holders or owners of such certificates, "bonds of the city, running twenty years and bearing not exceeding ten per cent. interest, shall be issued by the proper officers of the city for the amount, or a warrant may be agreed upon."

That the certificatés of indebtedness mentioned in the ordinance were issued without authority of law has been expressly decided by the supreme court in the case of *Weder* v. *The City of East St. Louis et. al.*, 55 Ill., 133; and that they are illegal and

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void is not disputed by counsel for defendants. The question, and the only one, in my opinion, to be determined in this case is: Has the common council of the city of East St. Louis authority, under the laws of this State, to pay out the money of the municipality as provided in the ordinance? The question is simply one of power and must be answered regardless of the merits or legality of the claims sought to be paid. Whatever the power conferred upon the council may be, they cannot be transcended nor disregarded. I concede, as claimed by the defendant's counsel, that municipalities may ratify the unauthorized acts and contracts of their agents or authorities; and that, perhaps, they may go a step further and accept and make compensation for benefits conferred upon them outside of any contract or agreement. But this must be understood to apply only to such acts, contracts and benefits as are within the corporate powers of the municipality to ratify or accept. It is clearly impossible to ratify, accept or make good an act, contract or benefit which is without the scope of the corporate authority.

The charter of the city being both the source and the limit of its powers, we must look solely to the provisions of that charter for the solution of this question. Article 3, section 4, of that instrument empowers the council to appropriate money, and provide for the payment of the debt and expenses of the city, to borrow money on the credit of the city, not exceeding $100,000; to issue bonds, scrip or certificates of indebtedness therefor, etc.; and then it is provided, that "with the money so borrowed the city council shall first liquidate and discharge all the legal indebtedness of the city, and the balance shall be equitably expended by the council in general improvements that shall be for the general benefit of the city." There is no other provision of the charter which authorizes the council to create a debt against the city.

It is a well established rule of law that where power is given to municipal authorities in express language to become indebted, the terms and purpose of the grant will measure the extent of the power. It is useless to multiply words to explain or enumerate the purposes for which the council may create debt in the name of the city. The language of the charter sets forth the

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purposes in as explicit words as can be used. A debt can be created only for the purpose of discharging the "legal indebtedness" of the city, and for general improvements. It was, no doubt, the expectation of the legislature, when it created the charter, that the annual revenues of the city would meet its annual expenses, and it was certainly intended to limit the powers of the council to create debts, otherwise unbounded prodigality and consequent ruin must frequently result; and to limit the power to "legal indebtedness" is not only reasonable, but most obvious and necessary. I must then, regard the provision of the charter above quoted as a restriction upon the powers of the council, and hold that any contract made, or attempted to be made, by it, looking to the payment of this scrip, which, it is admitted, the city is under no legal obligation to pay, is not only unauthorized but prohibited by the charter. The demurrer to the bill is, therefore, overruled, and a temporary injunction is granted as prayed for, on complainant entering into bond in the sum of $1,000, with security to be approved by the clerk.

OPINION OF ATTORNEY-GENERAL EDSALL.

SIR:—In pursuance of the request contained in your letter of the 5th inst., I have examined and will state my opinion upon the question as to whether assaults and assault and battery are punishable by indictment under the law now in force.

In *Carpenter* v. *The People*, 4 Scam. 197, it was held that by the statute then in force, exclusive jurisdiction of those offenses was expressly conferred on justices of the peace.

The constitution of 1818, which was in force at the time of that decision, did not in terms confer any jurisdiction upon the circuit courts, but invested the general assembly with full power to establish courts, inferior to the supreme court, and regulate their jurisdiction. *Constitution of* 1818, *Article* 4.

It was very properly held under that constitution, that where the statute in terms conferred exclusive original jurisdiction of certain offenses on justices of the peace, the circuit

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courts could not take original jurisdiction of the same class of offenses.

The constitution of 1870, contains this provision: "The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is, or may be provided by law." *Art. VI*, § 12.

Prosecutions for crimes and misdemeanors including assault and asssault and battery, are undoubtedly "causes in law," within the meaning of the constitution. The general assembly has no power to abridge the original jurisdiction of the circuit courts, which is conferred by the constitution itself. Upon this ground it was held, that the clause of the Act of April 5, 1872, purporting to confer upon the county courts, "exclusive jurisdiction of all criminal causes and misdemeanors where the punishment was not imprisonment in the penitentiary or death," did not deprive the circuit courts of jurisdiction of that class of offenses. *Weatherford et. al.* v. *The People*, Jan'y term, 1873, (unreported); *Myers* v. *The People*, 5 Chicago Legal News, 255.

This principle seems to have been recognized in the late revision of the statutes. It is provided that: "Justices of the peace shall have original jurisdiction in all cases of misdemeanors where the punishment is by fine only, and the fine does not exceed $200, and in all cases of assault, and assault and battery, and affrays, in which the people are plaintiffs." *Rev. Stat.* 1874, p. 405, § 381.

Such jurisdiction is not and could not have been conferred exclusively on justices of the peace.

Section 22 of the criminal code provides that: "Whoever shall be guilty of an assault, or assault and battery, shall be fined not less than $3 nor more than $100." *Rev. Statutes of* 1874, p. 355, § 22.

The statute also provides that all offenses cognizable in the circuit and in the criminal courts of Cook county, "shall be prosecuted by indictment." *Ibid.* p 406, § 393.

Inasmuch as those courts have, under the constitution, original jurisdiction of prosecutions for assault, and assault and battery, it necessarily follows, that the same may be prosecuted in such courts by indictment. The criminal court of Cook county,

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has "the jurisdiction of the circuit court in all cases of a criminal or *quasi* criminal nature." *Constitution* 1870, *Art.* 6, § 26.

If the circuit courts have original jurisdiction of prosecutions for assault and battery, it is undeniable that the criminal court of Cook county possesses like jurisdiction. Assaults, and assault and battery, were indictable offenses at common law. 1 *Hawkins' Pleas of the Crown*, 264; 1 *Bishop Crim. Law.*, §§ 548–550; 2 *Bishop Crim. Procedure*, §§ 54–70.

Whilst it is true, that in most offenses of this character, it is less expensive and altogether advisable to prosecute the same before justices of the peace in the summary proceeding authorized by the statute; yet cases may not unfrequently occur, when it will advance the public interests to have the circuit court exercise original jurisdiction. Parties may be indicted for assault with intent to commit murder, or for assault with a deadly weapon with intent to inflict a bodily injury, and upon the trial the proof may not be sufficient to warrant a conviction for either of these offenses, yet may show an aggravated assault and battery.

If the circuit courts have original jurisdiction of the latter offense, convictions may be had therefor, when the evidence justifies it under indictments for either of the former offenses. *Beckwith* v. *The People*, 26 Ill., 500; *Carpenter* v. *The People*, 4 Scam. 198.

Convictions for assault and battery may be thus obtained in cases where the prosecution would wholly fail, if the circuit courts have not original jurisdiction of this class of cases.

Very respectfully,

JAS. K. EDSALL.

Hon. CHAS. H. REED,

State's Attorney, Cook Co.

HON. WILLIAM W. O'BRIEN.

Hon. W. W. O'BRIEN, has removed from Peoria to Chicago, and formed a law partnership with the Hon. William Barge and S. Dixon, both formerly of the Dixon bar, in this State. The firm is, O'BRIEN, BARGE & DIXON, and their office in Nixon Block, Chicago.

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POWER OF CORPORATIONS TO TAKE AND HOLD REAL ESTATE.

FOREIGN CORPORATIONS, THEIR POWER TO HOLD REAL ESTATE.

It may be regarded as the settled law of this State, that a corporation can act only in the manner prescribed by the act of incorporation which gives it existence. *Betts* v. *Menard*, Breese, 395; *Town of Petersburg* v. *Metzker*; 21 Ill. 205. The corporation is precisely what the act incorporating has made it, deriving all its powers from the act, and being capable of exerting its faculties only in the manner the act authorizes. This doctrine has been recognized and adhered to by all the courts in this country, without any serious departure from it. *Metropolitan Bank* v. *Godfrey*, 23 Ill., 602, and the numerous cases there cited. See also, *City of Chicago* v. *Rumpff*, 45 Ill., 90; *The People* v. *The Chicago Board of Trade*, Ibid, 112; *Bank of Augusta* v. *Earle*, 13 Pet. 521. Corporations legally established under the laws of one of the States of the United States are legally competent to negotiate, and enter into contracts beyond the jurisdiction of the State where they are created. It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate and is no longer obligatory, the

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corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty. But, although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible, yet it is a person for certain purposes in contemplation of law. Corporations created in this country, have for many years made contracts in England, with never a doubt suggested of their validity, and the rules of comity between foreign nations apply to the States of this Union. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Tombigbee R. R. Co.* v. *Kneeland*, 4 How. 16; *Kennebec Co.* v. *Augusta Ins. and Banking Co.*, 6 Gray, 204; *Ohio Life and Trust Co.* v. *Merchants' Ins. and Trust Co.*, 11 Humph. 1. See also, *Blair* v. *Perpetual Ins. Co.*, 10 Mo. 559. The statute of this State provides, sec. 1, § 5 Hurd's Stat., p. 1011, that: "The words 'person' or 'persons,' as well, all words referring to or importing persons, may extend and be applied to bodies politic and corparate, as well as individuals."

The supreme court of New Jersey, in *Columbia Fire Ins. Co.* v. *Kinyon*, American Law Reg., for Nov., 1874, p. 676, the court say: "corporations are artificial beings, the creatures of private law, and not citizens within the meaning of that clause of the Federal constitution, which secures to the citizen of each State 'like privileges and immunities with the citizens of the several States.' It may therefore be conceded, not only that our legislature may put under restraint business transacted in this State by a company created by the law of another State, but in the exercise of their plenary powers may limit, if they can not deny the right of such company to sue in our courts."

Our supreme court in discussing this question in *Ducat* v. *The City of Chicago*, 48 Ill., 174, say: "This is an important and very interesting question, and we have very carefully considered the points made by appellant, and the argument in their support, and have reached the conclusion that corporations are not citizens within the meaning of section 2 of article 4, of the constitution of the United States. Appellants proposition is,

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that corporations created by the laws of New York, are to the intents and purposes for which they are created citizens of New York, and as such entitled to all the benefits of the section above cited, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.' We have examined all the authorities cited on both sides of this proposition, and cannot find it has ever been decided by any court that corporations are citizens within the sense and meaning of this clause." The court reviews, *Louisville C. & C. R. R. Co.* v. *Litson*, 2 How. 497; *Covington Draw Bridge Co.* v. *Shepherd*, 26 How. 227; *Lafayette Ins. Co.* v. *French et. al.*, 18 How. 404; *Hope Ins. Co.* v. *Boardman*, 5 Cranch, 57; *Bingham* v. *Cobut*, 3 Dallas, 382; *Bank of the United States* v. *Deseaux et. al.*, 12 Modern. A corporation is *quod hoc*, a citizen for the purpose of suing and being sued.

The court then, on page 177, say: "It seems to us there is much more sound sense and a more just appreciation of this subject to be found in the view expressed by Chief Justice Taney, in the case of the *Bank of Augusta* v. *Earle*, 13 Pet. 519, cited with so much deserved approbation by appellants counsel, in which he places the power of a corporation created in one State to make contracts in another State, upon the comity between the States, and says, "that the comity thus extended is no impeachment of sovereignty, it being the voluntary act of the State by which it is offered, but inadmissible when contrary to its policy, or prejudicial to its interest. This power then, existing by comity, inadmissible when it is contrary to the policy of a State to admit it, the pretense that in this respect the corporation is vested with all the rights of a citizen of another State vanishes. The same comity which recognizes their contracts should recognize their power to enforce them by suit, otherwise the power to contract would be in a great degree nugatory." If the members of a corporation are to be regarded as individuals, carrying on business in their corporate names and therefore entitled to the privileges of citizens in matters of contract, it is very clear they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this doctrine would be to make a corporation a

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mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation, and he might be sued for them in any State in which he might happen to be found. The clause of the constitution in question, certainly never intended to give to the citizens of each State the privileges of citizens of the several States, and at the same time exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. "This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself. Besides, it would deprive every State of all control over the extent of corporate franchises proper to be granted in the State; and corporations would be chartered in one State to carry on their operations in another." "Whenever a corporation makes a contract it is the contract of the legal entity; of the artificial being created by the charter and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State." The court in the case of *Ducat* v. *City of Chicago*, *supra*, on page 179, say: "Corporations have no *status* in States as citizens of the State creating them, and when they come into this State to do business and make profits, a discrimination can be rightfully made between them and our domestic corporations of the same character; that if it should be deemed good policy by the legislature, they could be so taxed or otherwise burdened as to compel them to leave the State. They may be regarded as a benefit or a nuisance, according to the caprice of the legislature, they not being citizens in any approved sense of that term, which can be correctly understood in no other sense than that in which it was understood in common acceptation, when the constitution was adopted, and as it is universally explained by writers on government, without an exception. A citizen is of the *genus homo*, inhabiting and having certain rights in some State or District. Such a being, if a citizen of New York, or of any other State of this Union, is for many purposes a citizen of this and of all the other States, and is entitled to all such privileges and immunities within the purview of the constitu-

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tion as the citizens of those States permanently residing therein are entitled to. These are personal privileges, many of which are specified in the case of *Corfield* v. *Coryell*, 4 Wash. C. C. R. 371. These privileges attach to him in every State into which he may enter as to a human being—as a person with faculties to appreciate them and enjoy them—not to an intangible, a mere legal entity, an invisible, artificial being; but to the man, made in God's own image. The individual citizen has the power of moving from place to place, as his business or his pleasure may prompt. He has rights which are so important as to make it desirable that they should be uniform throughout this broad and expanded Union; which, in order to promote mutual friendship and free social or business intercourse among the people of the several States, were placed by this clause of article 4, under the protection of the Federal government. In the case of corporations no such reason exists. Corporations in the States of their creation are not entitled to the privileges or 'rights' as appellant claims of the citizens of such State. They can not vote at elections; they are ineligible to any public office; they can not be executors, administrators or guardians. They are artificial beings, endowed only with such powers, and privileges and rights as their creator thought proper to bestow upon them. They have not the power of locomotion, and of course are not fit subjects in the view above expressed of the constitutional clause on which this cause turns, not being able to go into the States of the Union at their corporate will and pleasure, and exercise their faculties therein, they can not by any reasonable and just view of that clause be deemed as coming within its spirit or object." It is provided by statute, in this and most of the States, that: "Religious Societies," "Agricultural and Horticultural Societies," "Canal Companies," "Horse Railway Companies," "Toll Bridges," "Toll Roads," "Universities," "Colleges," "Academies," etc., may become incorporated under general or special acts of the legislatures, and may hold certain real estate, usually such quantities as may be necessary for the purpose of carrying out the purposes and object of the corporation. The statute authorizing such corporation to take and hold such real estate for the uses and purposes of the corporation. The

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statute of this State, chapter 32, entitled Corporations, Hurd's Stat. p. 285, provides, § 1. "That corporations may be formed in the manner provided in this act, for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the bnsiness of loaning money; *Provided*, that horse and dummy railroads may be organized and conducted under the provisions of this act. *And provided further*, that corporations formed for the purpose of constructing railroad bridges, shall not be held to be a railroad corporation." Section 5, of this chapter provides that the powers of "Corporations formed under this act, shall be bodies corporate and politic, for the period for which they are organized, may sue and be sued, may have a common seal which they may alter or renew at pleasure, may own, possess and enjoy, so much real and personal estate as shall be necessary for the transaction of their business; and may sell and dispose of the same when not required for the uses of the corporation. They may borrow money at legal rates of interest, and pledge their property both real and personal, to secure the payment thereof, and may have and exercise all the powers necessary and requisite to carry into effect the object for which they may be formed; *Provided, however*, that all real estate so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction, at least once every year, at the door of the court house of the county wherein the same may be situated, or on the premises so to be sold, after giving notice thereof for at least four consecutive weeks, in some newspaper of general circulation published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county, and if there be no newspaper published therein, then in the nearest adjacent county where such newspaper is published, and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, costs and other expenses. *And provided further*, that in case such corporation shall not within such period of five years sell such lands either at public or private sale as aforesaid, it shall be the duty of the State's attorney to proceed by information, in the name of the

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people of the State of Illinois, against such corporation in the circuit court of the county within which such lands so neglected to be sold shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules as the court shall establish. The court shall fix such fees of the State's attorney, such sum as shall be reasonable, and the proceeds of such sale, after deducting the said fees and costs of proceedings shall be paid over to such corporation."

Section 26 of the same chapter, provides that: "Foreign corporations and the officers and agents thereof, doing business in this State shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character, organized under the general laws of this State, and shall have no other or greater power. And no foreign or domestic corporation established or maintained in anyway for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State except as provided for in this act." It has been repeatedly held, both in the State and Federal courts, that a corporation created by the laws of one State may take and hold lands in another, as authorized by its charter, when not prohibited by the statutes nor repugnant to the policy of the State where the lands were situated.

In the *New York Dry Dock Bank* v. *Hicks*, 5 McLean's Reports, 111–116, it was decided that a New York corporation could take and hold lands in the State of Michigan, the court in its opinion says: "A corporation aggregate, is constituted of citizens who for the purposes of their charter are authorized to act in the name they have assumed, having the rights generally which may be exercised by an individual." "Representing the rights of citizens there is nothing in their organization which should deprive them of the comity of collecting their debts by suits in other States, and of holding property therein, received as security for their debts, or in payment of them. The holding of real estate in other States, in their corporate name, is no more the corporate functions than bringing a suit in their corporate name, which is now a right not controverted." *Bank of Augusta* v. *Earle*, 13 Pet. 588; *The Tanners' Loan and Trust Co.*

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v. *Douglass McKinney*, 6 McLean, 1. In *Gathrop* v. *Commercial Bank of Sciota*, 8 Dana's Rep. 128, it was decided that an Ohio corporation could take and hold land in Kentucky. The decision in this case goes to establish the doctrine that a corporation of one State can take and hold lands in another State by purchase, mortgage, or devise, when consistent with its charter, and not prohibited by positive law, 2 Kent's Com. (12th ed. 283, note *f*.) In *Lumbard* v. *Aldrich*, 8 New Hampshire Rep. 31, it was decided that a corporation created by the laws of another State had the capacity to take and hold lands in New Hampshire. *Libby* v. *Hodgdon*, 9 New Hamp. 396.

In *The State* v. *Boston C. & M. R. R. Co.*, 25 Vermont, 433–442, 3, it was decided upon an information filed by the State's attorney, that a corporation chartered in another State had the right to take and hold lands in Vermont. *Silver Lake Bank* v. *North*, 4 John. Ch'y Rep. 370; *Baird* v. *Bank of Washington*, 11 Serg. & Rawle, 411; *Thompson* v. *Troop*, 24 Penn. St. Rep. 474; *American Bible Society et. al.* v. *Marshal et. al.*, 15 Ohio St. 537; 2 Kent's Com. 283, and note; *Leazure* v. *Hillegas*, 7 S. & R. 313; *Fairfax* v. *Hunter*, 7 Cranch, 621. In *Runyan* v. *Carter's Lessees, &c.*, 14 Peters' Rep. 123–129, it was decided by the supreme court of the United States, that a New York corporation could take and hold lands in Pennsylvania defeasible as against the State, (defeasible because of the law of that State), but absolute against all others. The opinion of the court was delivered by Mr. Justice Thompson, in which he remarked: "The corporation must show that the law of its creation gave it authority to make such contracts. Yet, as in cases of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract was made; it is sufficient that its existence, as an artificial person in the State of its creation, is acknowledged and recognized by the State or nation where the dealing takes place, and that it is permitted by the laws of that place, to exercise there the powers with which it is endowed. Every power, however, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without the sanction, express or implied, of such sover-

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eignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States."

It was an incident at common law to every corporation, to have a capacity to purchase and alien lands and chattels, unless they were specifically restrained by their charters, or by statute. 2 Kent's Com. 281, note *b*, and cases cited; 5th and 6th McLean's Rep. *supra; Sherwood* v. *American Bible Society*, 1 Key's Reps. 561. In *Bard* v. *Poole*, 2 Kernan's (N. Y.) Rep. 505, and *Merrick* v. *Vansantwood*, 34 N. Y. Rep. 214, 222, it was held, that by the law of international comity, as recognized in this country and England, that the exercise of the chartered rights and powers of corporations should be sustained by the courts. It was held by the supreme court of Illinois, in *Carroll* v. *East St. Louis*, (not yet reported), that a foreign corporation can not enter into the purchase and sale of lands in this State. The court, per Walker, J., say:

"This was an action of ejectment, brought by appellee, in the St. Clair circuit court, against appellant, to recover a number of lots in East St. Louis. The usual declaration was filed and defendant interposed the general issue. The case was tried by the court, by consent, and the issues were found for the plaintiff, and a judgment rendered thereon. And defendant brings the record to this court and asks a reversal.

"It was stipulated by the parties, in the court below, that in September, 1869, the fee of the premises in dispute was in Samuel L. M. Barlow, and others, and that they conveyed the land in question to the 'Connecticut Land Company.' That it was a body corporate, created by the general assembly of the State of Connecticut, by act of July 27, 1868. Their charter shows that Joseph Alsop, Wm. W. McFarland, Samuel L. M. Barlow, and Wm. H. Aspinwall were created a corporation, with a capital stock of five hundred thousand dollars, with the privilege to increase it to one million.

"They are empowered to make by-laws provided they shall not conflict with their charter or the laws of Connecticut. And the corporation is empowered to lease, hold, receive, grant, convey, dispose of and transfer real estate, and to take the manage-

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ment and charge of the same, as well as such personal property as they may deem necessary to carry on their business transactions, and sell and exchange the same for other property, as they may deem to the interest of the corporation. They are also authorized to make, execute and deliver all necessary instruments either with or without the seal of the corporation.

"It provides that the affairs of the company shall be managed by not less than three, nor more than seven directors, one of whom shall be president. The office of the company is, by the charter, located at Hartford, in that State. It appears from the stipulation that the company purchased the property of Barlow and others, and took possession and held it until they conveyed it to the city. It is further agreed, that after the sale to the city, the defendant entered into possession of the lots, and still holds possession. It was also stipulated that the company held these and other lands in and near the city of East St. Louis, in the purchase of which their capital of $500,000 had been expended. It was finally stipulated the points to be decided were: had the Connecticut land company power, under their charter, to hold the lands in fee simple, under the deed from Barlow and others? had the company power to convey the title in fee, under their charter, to the city?

"Can a foreign corporation, created alone for the purpose of buying and selling lands, transact its business in this State without legislative permission? It would seem to be manifest, that a corporation created in one State can not do business in another, unless by permission, either express or implied. Such bodies do not, by their creation, acquire such a right, but it can only acquire the right by permission; but such permission, when not express, may, when it exists, be implied from the general character of legislation, and the usual course of business, which is denominated comity, between the States. In this State, no law has been passed either expressly allowing or prohibiting such bodies from transacting business in this State. And whether a corporation of this character may or not invest its entire capital in the purchase of our lands can only be determined by the general course of our legislation.

"When examined, it will be found that our statute books

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contain no charter organizing a company to trade in lands. But it will appear that for almost every other kind of legitimate business, they have been granted. And it is believed that the organization of bodies of this character are rare, and of recent date, and it seems to be anomalous legislation.

"In the creation of corporations, the general assembly are actuated by a desire to promote the general welfare of the people. That the pursuit of the business for which they are created will be useful and beneficial, and that the public interests will not be injured or retarded. The mere promotion of private interest by conferring on the corporators privileges and powers not enjoyed by the citizens-at-large would be vicious legislation, partial in its character, injurious in its results, and opposed to the principles upon which our government is based. Laws will not be adopted which in their own nature must wrong or oppress communities at large or local districts for the aggrandizement of the few.

"It is urged that the purchase of lands by a corporation like this is prohibited by the statutes of mortmain. The acts of the 7 Ed. 1 Stat. 11, adopted in 1279; the 13 of Ed. 1, Stat. 1, chap. 32, adopted in 1285; the 18 Ed. 1, chap. 3, in 1290; the 15 Rich., b. 2, chap. 5, in 1391; the 23 Hen. 8, chap. 10, in 1531, as well as the 36 chap. of Magna Charta, so far as they are applicable to our condition, are in force in this State, as they are not local in that kingdom, nor have they been excepted by the first section of the chapter of our statute, entitled 'laws.' But these statutes of mortmain do not make conveyances to corporations void, but voidable only, by the lord, immediate or mediate, or in their default, then by the king. Hence if these statutes are in force, they did not prevent this company from buying and taking the title, of which they could only be divested by an information on behalf of the people to enforce a forfeiture.

"The object of these various statutes was to prevent lands from being held in perpetuity. And when conveyed to a corporation having a perpetual existence, and no power existing to compel their sale, all lands conveyed to them were taken from general use, and ceased to be sold, or to pass to others by devise or descent, which was regarded as detrimental to the public, and

deprived the lord of his escheats, wardships, reliefs and the like, and hence the adoption of these statutes of mortmain.

"At an early period in the history of the legislation of our State, the law of entails was abolished as being well calculated to tie up estates, and to take them out of the ordinary course of descents and the commerce of the country. This followed from the very form of our government, which neither directly or indirectly favors or sanctions the law of primogeniture, or an aristocracy. The entailment of large landed estates is the basis on which a privileged class is sustained, and gives, in all countries where it prevails, an undue power to the landowners, which was supposed to be opposed to the principles of a government that knows no class and conferred special privileges on none. Hence it has been prohibited in most, if not all, of the States of the Union, to prevent a kind of perpetuity in holding lands in particular families.

"We thus see that our legislature has not, even by entail, sanctioned the tying up of the lands in the State, but have left it untrammeled as to sale, devise or descent, that it may be open to all to acquire and hold it, and thus promote the general welfare. Considerations of public policy have prohibited land to be settled by entail. And from this and other legislation we infer that perpetuities in tenures is not sanctioned by our laws, and are contrary to the settled policy of the State on that subject.

"It is manifest that to permit incorporations having a perpetual existence, to purchase and hold lands beyond what is required for the mere accommodation of such bodies, in transacting other business for which they are created, would be liable to all, if not other and greater evils, than to permit lands to be held in entail. This company is not required to sell, but is licensed to purchase, and only empowered to convey. Again, the only purpose of the organization of this company is to buy and sell real estate, and not for the transaction of other business, and is not like a foreign corporation organized for other purposes, who claim only the right to purchase so much land as may be required for the erection of offices, necessary for the transaction of its legitimate business; nor like a case where such

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a company has been compelled to purchase real estate for the collection of indebtedness due them. In such cases, these bodies might no doubt purchase for such purposes. We may ascertain the legislative intention by an examination of legislation in reference to domestic corporations. When we see the policy which has obtained on this subject while legislating for our own citizens and corporations, we may safely conclude, in the absence of express legislation on the subject, that it could not be intended that foreign corporations should enjoy more enlarged rights than those created by the general assembly. When we, then, refer to past legislation, we find that, from an early period, there has been manifested no disposition to permit our own corporations to hold real property beyond what was necessary for the erection of buildings to carry on their business and in the collection of debts due them.

"Where corporations have been created their powers have been limited to the purposes of their creation, as a general rule. We see it manifested in bank charters, in incorporating churches, railroads and other like organizations. And when such restrictions are imposed, we can not but regard it as amounting to a prohibition on such bodies, and as manifesting a studious care to prevent the holding of lands in mortmain.

"The only exception in our legislation that now occurs to us, is the charter of the Illinois Central Railway, where a large body of land was transferred to the company by the State, with which to construct the road. But in that case, the general assembly imposed it as a duty on the company to sell these lands within a specified period.

"Again, we see, from a reference to the journals of the two houses of the general assembly, that a charter, similar to that under consideration, was asked of that body, at its sessions of 1867 and 1869. At the former session, the bill failed from an adverse vote. At the latter, however, the bill passed both houses, and was sent to the governor for his approval, but it was refused; and the bill returned by him, to the house in which it originated, with his objections. Failing to receive a majority of the votes of all the members elect of both houses, as required by the constitution, it failed to become a law. Here we have the direct

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expression of the general assembly, showing its refusal to sanction the business of buying or selling lands in this State, by a corporation. The legislative will is thus clearly manifested, that our domestic corporations shall not have the power to purchase and hold lands in perpetuity, or even to trade in them as a business. And it is an irresistible conclusion that the law of comity does not exist to permit a foreign corporation to transact business in this State which has never been conferred on our own corporations, but has been repeatedly refused. Instead of inferring a license to do so, we must infer from such facts, that there is no law of comity that would authorize this company to carry on such a business.

"Acting in conformity with the previous course which had previously obtained, we find the general assembly, on the 18th of April, 1872, in adopting a general incorporation law for our State, have strictly adhered to the former policy. The first section of that law provides for the formation of such bodies, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money. It is contended that this provision, by implication, authorizes such corporations, as it does not, in terms, prohibit them; and if they are authorized, then we should infer that such foreign corporations may, by comity, transact such business in this State. If this was the only provision on the subject, contained in the law, there would be plausibility in the proposition. But churches, authorized to incorporate under the law, are restricted to ten acres; and the fifth section limits all other corporations formed under the act to so much real estate as may be necessary for the transaction of their business, and authorizes them to purchase real estate in the satisfaction of debts, and requires them, in such cases, to offer the same for sale, at public auction, at least as often as once in each year; and if not thus sold for cost and interest within five years, the State's attorney is required to commence proceedings in the circuit court for the sale of such property. From the legislation before and since the creation of this corporation, we are clearly of the opinion that there are no grounds for the inference that such bodies can come into the State and enter into the purchase and sale of

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lands. We can not imply such comity; but the reverse is apparent. To sustain the action of this corporation would be to violate the fixed public policy of the State.

"Whilst foreign corporations, created for ordinary purposes, may, under the law of comity, transact business in this State, they are required to do so under such restrictions as may be imposed. The last clause of section twenty-six of our incorporation act prohibits foreign corporations from purchasing and holding lands, except as provided for in that statute. And although the effort to purchase in this case took place before the adoption of this law, still it is another evidence that there was no intention to depart from the previous policy by legislation.

"We are not prepared to hold that another State can come here and purchase large bodies of our lands and lease them on such terms as the State owning them might choose. Nor can another State organize a corporation, with power to do so, against the will of this State.

"Persons becoming incorporated in one State, for the purpose of transacting all the business of the corporation in another State, cannot have any claim upon the latter State, for indulgence or protection. And they would have less grounds to complain if they had applied to the latter State for a charter for the purpose, and it had been refused.

"In the case of the *Bank of Augusta* v. *Earle*, 13 Peters' R., 589, the court say, 'that the comity between States, so far as it relates to corporations, depends 'for its exercise upon the laws of the sovereignty in which the power is exercised;' 'and a corporation can make no valid contract without their sanction, express or implied.' * * 'The comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests.' It is also said that in the absence of any positive law, 'affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests.' This rule was adopted in *Ducat* v. *The City of Chicago*, 48 Ills., 172; and we have seen no reason to be dissatisfied with its practical application.

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"We have then, seen that to permit a foreign corporation to locate itself in our State, for the sole purpose of buying lands, and to sell them or not at their pleasure, is repugnant to the policy of this State, and would be prejudicial to its interests. Hence, under the authority of the *Bank of Augusta* v. *Earle*, *supra*, such a body could make no valid contract, for such a purpose. And it follows that their effort to purchase, being in contravention of the policy of the State, and prejudicial to its interests, from Barlow and others, was void and conferred no title upon the company; and having none, they could convey none to the city, and it could not recover in this action.

"We deem it unnecessary to determine whether the officers of the corporation may not be regarded as the agents of those persons who attempted to convey to that body, so as to vest in the city an equitable title that might be rendered available in a court of equity."

In *Starkweather* v. *The American Bible Society*, not yet reported, this question again arose in the supreme court, and Walker, J., again delivered the opinion of the court. He said, "Appellants as devisees and heirs at law of Charles R. Starkweather, deceased, filed their bill in the circuit court of Cook county, to establish their title to the real estate owned by testator in his lifetime, under what is known as the burnt record statute, and among others the American Bible Society, was made a defendant. The society appeared and claimed an interest in the property under the fifth clause of his will. Their right was contested and the court below rendered a *pro forma* decree in favor of the Bible Society, to revise which, this appeal is prosecuted.

"There is no question raised as to the proper execution and probate of the will, nor is it disputed that the will contained a devise of the interest claimed by appellees.

"The clause in the will is this: 'I give and bequeath to the Trustees of the American Bible Society established in 1816, an undivided eighth of my estate, to have and to hold the same for the use of said society, provided that said Bible Society are not to be entitled to the same, or to the income of the same, till my youngest child becomes of age.' The society was incorporated by a statute of the State of New York, passed on the 25th of

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March, 1841, for the purpose of publishing and prosecuting the general circulation of the Scriptures, without note or comment. It was vested by its charter with the powers granted to corporations in that State, by their revised statutes, amongst which is this power: 'To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.' The Statute of Wills in that State, adopted in March, 1813, authorizes having real estate to devise the same to any person or persons, except bodies corporate and politic, by his last will and testament.

"Again, in 1822, in revising the statutes, it was provided that corporations might take hold and purchase real estate; but it was declared that no devise to a corporation should be valid unless such a corporation be expressly authorized by its charter to take by devise.

"Thus it will be seen that the charter of this company does not prohibit it from taking property by devise; but the Statute of Wills does expressly declare that no devise to a corporation shall be valid unless such corporation is authorized by its charter or by statute to take in that manner. These provisions thus found in different chapters of the statutes of New York, have given rise to litigation in that State to obtain a construction of these acts. The courts of last resort in New York, have held that a devise to a corporation not thus expressly authorized to so take real estate in that State was, and that such corporations have no power to receive and hold real estate. See *Downing* v. *Menshall*, 23 N. Y., 366; *McCartie* v. *Orphan's Asylum*, 7 Cowen, 437. In these cases it was held that these statutes must be regarded as being in *pari materia*, and should be construed together, and we have seen the result at which their courts arrived.

"At the common law it is believed that no such devise could be made. And the 32 Hen. 8, ch. 1, and the 34 Hen. 8, ch. 2, commonly called the Statute of Wills, gave power to every person having sole estates in fee of manors, etc., 'to give, dispose, will or devise to any person or persons, except to bodies politic or corporate, by his last will and testament, such lands, etc.' Thus it will be seen that New York adopted this enactment in

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substance. And the policy of these statutes was undoubtedly to prevent gifts to these bodies of mortmain.

"It is also said 'that where the Statute of Wills excepts bodies politic as competent devisees, the usual power given to corporations to purchase lands, etc., has been construed not to qualify them to take by devise, the word purchase being understood in its ordinary and not in its legal and technical sense.' Angel & Ames on Corps, 111. And in support of the text they refer to *Jackson* v. *Hammond*, 2 Cains' Cases, 337; *McCartie* v. *Orphans' Asylum*, 80 *supra; Canal Co.* v. *Railroad Co.*, 4 Gill. and Johns. 1, which sustain the rule.

"We then find a corporation created and located in New York incapable by devise of taking and holding real estate therein, claiming to hold real estate here devised to it by a citizen of this State.

"Appellees contend that the Statute of Wills in New York only operates as a disability upon all persons in that State, to become devisors of real estate to this company, and that the charter does not prevent them from receiving lands by devise from persons living beyond the limits of the State, and hence this devise is valid and binding. We have seen that the courts of New York have held that such companies are not authorized to take and hold property in that State, and if incapable of doing so there, it may be asked, can it exercise powers and discharge functions beyond the limits of that State which it is not capable of doing under the laws of the State which created and endowed it with its powers and function? Such bodies have such powers only as are conferred upon them by the laws of the State in which they are created.

"It does not matter whether this body is prohibited by its charter or by the Statute of Wills in New York from taking lands by devise. Whether the one or the other statute creates the disability the effect is the same, as it goes to the power of so taking and holding.

"When this body was incorporated, the Statute of Wills was in force. And the courts of New York that it controlled the powers of the company as though both provisions had been contained in the same enactment.

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"And if so, the disability is fundamental.

"It operates to create a corporation that might perform the acts and exercise the privileges conferred, but without power to receive land by devise.

"Such a prohibition goes to the power of the body as well as to persons disposed to devise lands to them. If then the corporation was created without power to so take, it is incapable of doing so no matter where the devisor may reside. The reasons operating on the legislature, when they refused to endow this and similar organizations with such capacity, grew out of considerations of sound public policy in thus preventing them receiving and holding lands in mortmain. And this was effectually accomplished by their Statute of Wills.

"We can perceive no difference whether the disability or prohibition is contained in the one or the other enactment, as it operates on the body, as the New York courts hold, with the same effect, and produces the same results. It carries out the policy of the State as effectually in the one mode as in the other, and goes to the power to thus take real estate, and operates as a prohibition and a want of power. And the power not existing in the body, so to take all such devises to it must be ineffectual to pass title without reference to where the devisor may reside or the lands may be situated.

"It may be said that the lands, not being in New York, it can in no wise affect the policy of that State for the company to hold land in another State. Such bodies can only exercise their privileges and functions in other States by permission expressed or implied. When by implication it is denominated comity between States.

"For such bodies to hold property or transact business in a State different from that of its creation, it must have such permission. This being so, New York has no power to create a body incapable of taking lands by devise in that State, and yet with power to do so in a foreign jurisdiction. If their legislature were to so direct, and other States were to consent, then such bodies might no doubt so receive and hold land, but that legislature has not so enacted, nor has our State so consented.

"In the case of *Carrall* v. *East St. Louis*, this court held

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that a foreign corporation could not hold lands in this State beyond what was reasonably necessary for the transaction of the business for which they were created. That a corporation created in another State for the purpose of buying and selling lands, could not come to this State and pursue the business for which the corporation was created. That conveyances to it of lands in this State were void, and failed to pass title to the corporation.

"And the inability was placed on the ground that it was opposed to the policy of this State deduced from the course of its general legislation. The principles there announced apply with full force to this case, as all of the inconveniences and injuries are as likely to ensue in this and other cases like it as in that. We however deem it unnecessary to again repeat the reasons which led us to the conclusions announced in that case. But we must hold, that case is conclusive of this. Then, whether this corporation is incapable of taking this land under the laws of New York or under the laws of this State does not matter, as the result is the same.

"We however think the company is incapable of taking under either.

"Nor does the purpose for which the corporation was created change the principle. It does not matter how commendable and beneficial the purpose of the organization may be, or what amount of benefit it is calculated to accomplish, the rules of law must have their proper application, leaving it to the general assembly if necessary to make the changes.

"It is however urged that even if this devise is void the court may, and nevertheless should carry out the intention of the devisor, by directing the sale of this real estate and decreeing the payment of the proceeds to appellees. That is not only sanctioned but required by the former adjudications of this court.

"In the case of *Harris* v. *Harris*, 41 Ill. 425, a party had made a will and had provided that his estate should be reduced to money and then be divided, one half to the school district in which his farm was situated, and the fund to be managed by a trustee to be elected by the people of the district for four years, to give security and perform the duties without compensation,

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the other half to the support of the poor of the county, but only the interest to be used.

"As in the one case it was impracticable to find a person who would take charge of the fund and manage it for the use of the schools of the district, and as to the other fund there were no trustees named or any mode pointed out by which trustees might be obtained, the court held that as these objects were within the language of the 43 Eliz., ch. 4, which was held to be in force in the State, there was power to execute the trust *cy pres*. And trustees were designated to carry out the provisions of the will. And it was there said in reference to the portion set apart for school purposes, the bequest was made to a corporation capable of taking it, and the mere instrument to control its application could be readily provided by a resort to a court of equity; and as to the fund bequeathed to the poor, the county court was the proper donee of the fund and could take and control it, as the trustee of the poor, in the mode prescribed by the will.

"It will be observed that in that case there were devisees capable of taking as trustees. But in this case we have seen the donees were incapable of taking and holding the property for the want of legal ability.

"Again, in that case there was no change of the fund, nor was it converted from one kind of property into another. But all that was done was to simply declare that the bequest should not be lost for the want of a trustee, and that one might be appointed *cy pres* to carry out the intention of the donor. But here we are asked to do more—to convert this real estate into money and pay it to appellees.

"A reference to the 43 Eliz., ch. 4, will show that all the subjects intended to be embraced in that statute are embraced in the preamble, but corporations of the character of the Bible Society *is* not enumerated. It embraces 'schools of learning, free schools, and scholars in universities;' also, 'old, impotent and poor people.' Hence the fact that the 43 Eliz. may be in force in this State does not by any means confer the power. And it is believed that the doctrine of executing trust *cy pres* has its origin in that enactment. In the case of the *Trustees of the Baptist Association* v. *Hart's Exrs.*, 4 Wheat., 1, Chief Justice

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Marshall, in delivering the opinion, has very fully examined into the ground of chancery jurisdiction in this country, and it is there held that whatever may have been the power of the king as *parens patriæ* in England, or even of the courts of chancery when acting under the authority of the royal prerogative, and not in the exercise of their ordinary jurisdiction, that in this the validity of devises and bequests, must be determined by well-defined legal rules and principles, and not by an arbitrary discretion or by unlimited power by the court under the royal prerogative. Hence the opinion says: 'It is perhaps decisive of the question propounded to this court to say that the plaintiffs can not take the property.'

"In the case of *Fountain* v. *Ravence*, 17th Howard, 369, which involved a bequest of property to be appropriated by the executors of the testator to such charitable institutions in South Carolina and Pennsylvania as they might select and deem most beneficial to mankind, the executors died without naming the institutions, and before the time therefor had expired. It was held to be inoperative and not capable of being enforced in the circuit court of the United States. In that case it was held that such charities were only executed in the English courts of chancery by virtue of power derived from the royal prerogative, and which was not inherent in the court as a court of equity under its ordinary jurisdiction.

"Chief Justice Taney, in delivering the opinion of the court, lays down the doctrine that the same rules that govern an ordinary trust and determine its validity, apply to and determine the validity of a charitable trust, and that if the *cestui que trust* or beneficiary is incapable of maintaining a suit in equity to establish his claim in an ordinary case of trust the same rule must be applied when charity is the object, and complainant claims to be recognized as one of its beneficiaries.

"And the same doctrine is announced in the case of *Wheeler* v. *Smith*, 9 How., 55; also, in the case of *Vidal* v. *Gerard's Exrs.*, 2 Howard, 195, where the authorities are extensively reviewed.

"In the case of *Williams* v. *Williams*, 4 Denio, 542, the court says: 'That the English doctrine is in force here only so

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far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it can not be executed by the court, and when the purpose is illegal or impossible, the claims of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are intrusted only with judicial authority.'

"This we regard the true doctrine, and the execution of trusts *cy pres* should be limited to the rule there announced.

"Where the trust is legal and is definite as to the person to whom the gift is made, and the thing given, and only requires a trustee to carry out the purpose of the donor, then a court of equity may well act in preserving the trust from lapsing.

"The case of *Williams* v. *Williams*, *supra*, was followed in New York by the cases of *Buckman* v. *Bensor*, 23 N. Y. R., 308, and *Bascom* v. *Albertson*, 34 N. Y. R., 610, and they announce and apply the same rule.

"We, however, are asked to go further in this case. We are urged to direct the sale of this real estate, and pay appellees the proceeds. Why should we do so in favor of a charity of this character when such relief is denied to a natural person? If a man were to devise lands to a child and it prove that he had no title to the property devised, could it be claimed that the court would carry out the intention of the devisor by decreeing to the devisee other property of equal value? We suppose that no one would contend that simply because the devisor's intention had been unexpectedly defeated that the court would, therefore, make a new will for the devisor, and give the devisee an equivalent of what was intended.

"The testator, no doubt, intended to give this land to appellees, but the means employed to accomplish his purpose, does not clothe the court with power to give money or other property.

"The courts are so strict that they will not permit the terms of a will to be altered, even when the devisor has by mistake misdescribed land in a devise, by substituting that which could be clearly proved to have been intended. *Kurtz* v. *Hibner*, 55

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Ill., 514. Then why change the fund from land to money where the testator intended to give land and not money?

"Why substitute something not donated because something intended to be donated did not vest in the donee?

"When the testator died, all of the real estate of which he died seized and which was intestate, at once descended to and vested in his heirs. And as appellees were incapable of taking title to the real estate attempted to be devised, that became thereby intestate property and descended to and the title vested in his heirs, as would any other intestate real estate.

"This being the case, we have no more power to order their property to be sold to satisfy this void devise than that of any other person. Had there been beneficiaries capable of taking directly by devise, and had this case fallen within the statute of charitable uses; but the devise had failed simply for the want of a trustee, there the beneficiary would probably have taken an equitable title to the property devised. But here the beneficiaries are the whole world, and they are incapable of taking, and the corporation is incapacitated from taking, and hence neither a legal or equitable title has vested in either, but it has descended to the heirs of the testator.

"So that, in any view we have been able to take of the case, we fail to see any well-founded right that appellees have to the property, or the proceeds of its sale."

The courts of Ohio and Pennsylvania, have decided otherwise. See *American Bible Society et. al.* v. *Marshal et. al.*, 15 Ohio Stat., 537, and *Thompson* v. *Swoope*, 24 Penn. St., 474, where it is held, that where a corporation is generally competent to take land, the prohibition in the Statute of Wills, of the State in which it was created against all devises of lands to corporations, does not prevent it from taking and holding land in another State, by devise of one of its own citizens. The statute was intended to regulate the testamentary power of their own citizens, not that of citizens of other States, and to define the capacity of testators and not that of corporations. In the case of *McCortee* v. *Orphans' Asylum Society*, 9 Cowan, 437, it was held that the power to take by purchase, in its most general sense includes taking by devise, and that a provision of the

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charter conferring a right to take by purchase, will not be construed, to include a right to take by devise contrary to the Statute of Wills; and in the case of the *Theological Seminary of Auburn* v. *Child*, 4 Paige, 419, it was held that the charter of a corporation declaring it to be capable of "taking, purchasing, holding and conveying" real estate, does not authorize it to take by devise; and in *Downing* v. *Marshall*, 23 N. York, 366, it was held that authority to a corporation to take "by direct purchase or otherwise," is an express authority to take by devise, and in *Seaburn* v. *Seaburn*, 15 Grattan, 423, it was held, that a bequest of money to be laid out in land or invested for the use of a church, is void, as being unauthorized by statute and void at common law. The Chicago Legal News of date Nov. 14, 1874, page 61, the editor in speaking of the Starkweather case and the Carrol case *supra*, says: "The question arises, can foreign corporations loan money in this State and take real estate security, and upon default of payment take steps to enforce payment by sale of such real estate. We should say in the light of these decisions that such corporations can not become the purchasers of real estate, to secure even the payment of a debt, except as authorized by our statutes." Our statute *supra* clearly authorizes such proceeding, and it would seem that such right existed at common law. See *Conn. Mut. Life Ins. Co.* v. *Albert et. ux.*, 39 Mo., 181. It was there held that a foreign corporation not engaged in the business of banking in that State may make loans of money and secure the same by trust deed or mortgage, and maintain ejectment to recover possession of the same; but such corporation I apprehend would be compelled to advertise and sell the land, as provided by the statute above cited. It would seem from the cases above cited from our supreme court, to be the rule and policy of this State, that no corporation created by a foreign State, can take or hold real estate, either by purchase, gift or devise in this State, except such as may be necessary for the transaction of its business, and except such as may be acquired in satisfaction of any liability or indebtedness due to such corporation.

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Supreme Court of Wisconsin.

PERKINS v. THE CITY OF FOND DU LAC.

NEGLIGENCE—MUNICIPAL CORPORATION—DEFECTIVE SIDEWALK—SNOW AND ICE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. In an action for an injury to plaintiff's person, alleged to have been caused by the defective condition of a public walk in the defendant city, it appeared that plaintiff, on his way to a railroad depot, passed westward along the *south* side of a certain street until he reached a bridge connecting the east and west portions of said street; that after crossing the bridge, he *passed over to the north side* of said street, and, in descending from the bridge to the sidewalk, along a plank walk which descended about two and a half feet in twenty, he fell and was injured; that it was a bright star-light evening in winter, with snow upon the ground; that plaintiff had in one hand a satchel and in the other books; that there were strips nailed across said descending walk, but these were entirely covered with packed snow and ice, and the whole surface of the walk was smooth and slippery. It also appeared that plaintiff had been on the walk frequently, and knew that it was an inclined plane at this point; but there was no evidence that he knew of its peculiarly slippery and dangerous condition at that time. It was one of the principal walks of the city, over which hundreds of persons were daily passing. There was a less descent from the bridge to the sidewalk on the *south* side of the street; and the middle of the street was planked. *Held*, that upon these facts the court did not err in *refusing to instruct* the jury, as a proposition of law, that plaintiff was *guilty of negligence* in descending upon this walk to the north side of the street; but that question was properly *left to the jury*.

2. The *mere slippery condition* of a sidewalk, arising from the ordinary action of the elements (as snow and ice), is not a defect which renders the town or city liable under the statute, (*Cook* v. *Milwaukee*, 24 Wis., 270, and 27 id., 191); but if the walk is in other respects unskilfully or improperly built, so as unnecessarily to increase the danger of persons walking thereon while it is covered with snow and ice, this will render it defective or insufficient within the meaning of the statute.

3. *Evidence for the defendant* city, "that there were a great number of bridges in the city that were built higher than the street, and that nearly all the approaches to these bridges were raised," was properly rejected as *irrelevent to the issue.*

APPEAL FROM THE CIRCUIT COURT OF FOND DU LAC COUNTY.

J. W. Bass, for defendant and appellant.

Geo. Perkins, plaintiff and respondent, in person, with *E. S. Bragg*, as counsel.

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The opinion of the court was delivered by

COLE, J.—It is insisted by the counsel for the city, that the court should have granted the nonsuit and dismissed the complaint, because it appeared from the plaintiff's own testimony that he was guilty of negligence, which contributed to produce the injury complained of. The facts upon which negligence on his part is predicated as a question of law, are the following:

The plaintiff testified, in substance, that at the time of the accident he was going to the railroad depot to take the cars to attend the Green Lake circuit on professional business; that he passed on Main street to the south side of Division street; that he went on that side of Division street until he crossed the bridge over the east branch of Fond du Lac river, when he crossed to the north side of the street, and in going down the descent from the bridge to the sidewalk, he fell and dislocated and broke his arm. It was about half-past six in the evening, on the 8th of January, when this occurred. It was a bright star-light night, with snow on the ground; and the plaintiff had in his right hand a satchel, and in his left a couple of law books. There was no sidewalk across Division street at the point where he crossed from the south to the north side, but the street was planked. The walk on the north side of the street from the bridge west was a slope or descent of about two feet and a half in twenty feet; was constructed of planks running with the street, with strips of wood nailed across the planks about an inch square and a foot apart. At the time, these strips were entirely covered with packed snow and ice, and the whole surface of the walk was very smooth and slippery. The plaintiff stated that he had known the place for some time—had been over the walk a good many times, and was aware that there was an inclined plane or slope in the walk at this point. It is assumed by the counsel for the city, that the plaintiff, in effect, admitted that he knew that this inclined plane was covered with snow and ice, and was in a very slippery and dangerous condition that night; and that he was guilty of carelessness in leaving the walk on the south side, which was more level than the one to which he crossed, and that there was no reason for his voluntarily turning out of a safe way to one more hazardous and dan-

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gerous. But we do not think the inference warranted, that the plaintiff knew of the peculiarly slippery and dangerous condition of the walk at that time, although he doubtless knew the manner in which it was constructed. But the walk was one of the principal ones of the city, over which it appears hundreds of persons were daily passing. Now we are asked to say, as a question of law, and the court below was asked to so rule, because the plaintiff had this general knowledge of the manner in which this walk was constructed, and that there was an inclined plane there, and crossed the street to this walk when he could have kept down the side of the street on which he was then going, that he was guilty of negligence which contributed to the injury. Upon the facts it seems to us impossible so to hold. The question whether the plaintiff was negligent under the circumstances was fairly submitted to the jury. The jury, among other things, were instructed that if they found from the evidence that the plaintiff knew of the unsafe condition of the walk in question, and by ordinary care and prudence could have seen and avoided it, he could not recover for the injuries which he had sustained by reason of its insufficiency. It seems to us the court properly referred the question to the jury to determine, whether under the circumstances, the plaintiff was exercising such care and prudence as ordinarily careful persons would use, in crossing the street and in not passing along the same sidewalk upon which he had been going. The street was planked, and could be conveniently crossed. There is no reason to suppose the plaintiff knew the inclined plane was in an unusually slippery and dangerous condition that night. He might naturally conclude that he could pass over a walk in safety where hundreds were constantly passing, and that he was not exposing himself to any perils by taking the north sidewalk to the depot. It seems to us the case is not essentially different from what it would have been had the plaintiff passed from Main street directly on to the walk on the north side of Division street, and there approached the dangerous part of the walk. If he would not then have been required, in view of his general knowledge of the way in which the sidewalk was constructed at that place, to cross over the street in order to avoid it, we can not see

how negligence can be predicated upon the fact that he crossed the street at the west end of the bridge and came on to the walk in question. At all events the inference of negligence and want of proper care on his part in coming upon the walk as he did, was not sufficiently clear to warrant the court in withdrawing the question from the jury. It does not come within the rule laid down in *Achtenhagen* v. *The City of Watertown*, 18 Wis., 331, which doubtless goes as far as any case decided by this court in raising the presumption of negligence as a question of law. I am certainly not disposed to extend the doctrine of that case, and I therefore think the question whether the plaintiff was guilty of negligence or want of ordinary care was, under the circumstances, one for the jury to pass upon.

Another important question discussed in the case is, whether the evidence introduced on the trial should or tended to prove that the sidewalk where the plaintiff was injured was out of repair, or constructed in so defective and improper a manner as to render the city liable on account of its negligence. It is claimed that the facts in relation to the condition of the sidewalk clearly show that it was not defective or unsafe for persons using due care in traveling upon it. We are of the opinion however that there was enough evidence bearing upon the question of defect or insufficiency to carry the case to the jury.

It appears from the testimony that the bridge across Division street was raised over two feet in the fall of 1870, and that when the bridge was raised this inclined walk on the north side of the street down to the sidewalk was constructed. The witness, *E. H. Jones*, testifies, that his place of business was on the south side of Division street, and that he was familiar with the structure of the walk and the approaches to the bridge on the west side of the river. He says that it was a very slippery place there during cold weather, and that in November, 1871, he spoke to the chairman of the ward, asking him if this sloping arrangement or sidewalk could not be done away with, and the walk made nearly level at that point, and told him that unless this were done there would be danger of persons falling in passing over it. The officer promised to have the walk raised before winter set in, but the walk in fact was not changed until the

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next spring. There were strips nailed across this inclined walk, and a railing put up on the north side to assist persons passing over it; but still it appears that when these strips became covered and packed with snow and ice the place was very slippery, so much so that it was difficult for travellers to pass up and down it. Now it is said that mere slipperiness of a sidewalk arising from the ordinary action of the elements, as snow and frost, is not a defect, in this climate, within the sense of the statute, for which a town or city is liable. This was so decided in *Cook* v. *The City of Milwaukee*, 24 Wis., 270, and id., 191. But in the case before us, while the slippery condition of the walk doubtless contributed with other causes to produce the injury, yet this was not the defect complained of. It is alleged in the complaint, and the testimony strongly supports the averment, that the walk at this point was constructed in a faulty and unsafe manner. And if it was unskilfully built, so as unnecessarily to increase the danger and peril of persons passing over it while it was covered with snow and ice, this would certainly constitute a defect for which the city would be liable. That it was practicable to construct the walk differently and more on a level with the bridge, so as to avoid the danger of passing up and down the descent, is a fact fairly inferable from the evidence. Indeed, it appears the walk was subsequently changed and raised up, thus doing away with the inclined plane. From these facts the jury might well have found that the walk was improperly built, and that as a consequence it was not safe and convenient for ordinary travel. If so, it was the fault of the city, and it must respond in damages to one sustaining injury through its negligence. The case is plainly distinguishable from that of *Cook* above cited, as these remarks show. If the chairman of the ward, when his attention was called to the matter, had raised the walk and extended it so as to reduce the grade, the injury would doubtless have been prevented. This shows a breach of duty on the part of the city authorities; at any rate it is enough to raise a fair presumption of negligence on the part of the defendant.

On the trial the defendant offered to show that there were a great number of bridges in the city which were built higher

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than the street, and that nearly all the approaches to these bridges were raised. The evidence was objected to, and excluded. We can not see what tendency the evidence offered would have to prove that the walk in question was constructed in a reasonably safe and proper manner. The way of constructing one walk might be so controlled by surrounding circumstances as to make it proper, and yet this might be a very unsuitable manner for constructing another. An uneven or inclined walk might be permissible where there was little travel and where connecting streets render it necessary; while such a walk might be a defect in a thoroughfare where thousands were passing daily, and where it was entirely practicable to construct the walk on a level. The evidence offered would only raise numberless collateral issues, which would distract the attention of the jury from the real question before them. We therefore think the evidence was properly excluded from the consideration of the jury. *Timm* v. *Bear*, 29 Wis., 256; and *Hubbard* v. *Concord*, 35 N. H., 52.

The judgment of the circuit court must be affirmed.

JUDGMENT AFFIRMED.

REPLEVIN BONDS.

The bond required to be taken by sheriffs and constables, from the plaintiff or some person in his behalf, before the execution of the writ, is of great importance, not only to the officers executing the writ, but to the parties. § 10 Hurd's Statute, p. 852, provides that: "Before the execution of any writ of replevin, the plaintiff or some one on his behalf, shall give to the sheriff or constable or other officer, bonds with sufficient security in double the value of the property about to be replevied, conditioned that he will prosecute his suit to effect and without delay, and make return of the property, if return thereof shall be awarded, and save and keep harmless such sheriff, constable, or other officer, (as the case may be,) in replevying such property.

It will be noticed by § 4 of the same chapter, page 851, that the statute requires that the person bringing such action, before

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the writ issues, to file with the clerk of the court in which the action is brought, or with the justice of the peace before whom the suit is commenced, an affidavit showing that the plaintiff in such action is the owner of the property described in the writ and about to be replevied, or that he is then lawfully entitled to the possession thereof, and that the property is wrongfully detained by the defendant, and that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this State, nor seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution or attachment; nor held by any writ of replevin against such plaintiff. It must be observed, that the statute does not require the plaintiff to aver or swear, in the affidavit to be filed for the purpose of obtaining the writ of replevin, as to the value of the property. The statute not requiring the plaintiff to swear to the value of the property about to be replevied, it was held by the Hon. A. J. Gallagher, Circuit Judge, and we think correctly, that perjury cannot be assigned for falsely stating in the affidavit the value of the goods described in the writ. The 10th § of the replevin act above cited, requires the sheriff, constable or other officer executing the writ, to take from the plaintiff, or some person on his behalf, a bond with sufficient security in double the value of the property about to be replevied. The question now arises, how is the sheriff, constable or other officer, to determine the value of the property described in the writ. It has been the uniform practice so far as I know, for the plaintiff to aver, in the affidavit the value of the goods about to be replevied, and the sheriff, constable or other officer has uniformly taken bond in double the value stated in the affidavit and writ, but it would seem, the statute not requiring the plaintiff to state the value, nor does the statute require the sheriff or other officer, to take bond in double the sum so sworn to, that it is the duty of the sheriff, constable or other officer, to exercise his own judgment, or take the affidavit of witnesses familiar with the value of the property described in the writ, and thus determine the value of the goods and take the bond in double the value of the property described in the writ. It is equally the duty of the sheriff or other officer, to take a bond in proper form, to avoid liability on

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his official bond. In the case of *Arter et. al.* v. *The People*, use, &c., 54 Ill., 228, it was held, to be essential to the validity of a replevin bond, that the name of the defendant in the suit appear therein. The bond being defective in that regard was held to be an absolute nullity, and the sheriff was held liable on his official bond. It is also well settled that a sheriff would be liable on his official bond for failing to take a replevin bond, or for taking insufficient securities. The object of a bond, under our statute, is not merely to indemnify the sheriff, but also to furnish an additional remedy to the defendant, in case the plaintiff fails to prosecute his suit with effect. *Petrie* v. *Fisher*, 43 Ill. 442.

As tó the liability of a sheriff, on his official bond in case of loss, where the loss occurs by reason of the sheriff taking bond in a less sum than double the actual value of the goods replevied, I find no case, but by parity of reason it would seem that the case, *The People* v. *Haines et. al.*, 5 Gil. 548, and *The County of Green* v. *Bledsoe*, 12 Ill. 267, are in point. These cases both were upon the official bond of school commissioners. The statute authorizing the loaning of certain school funds provides that: "for all loans for more than one year, security shall be given by mortgage on real estate, unencumbered, in value double the amount loaned, with a condition that in case additional security shall at any time be required, the same shall be given to the satisfaction of the commissioner for the time being." The cases hold, that if the commissioner acts in good faith and with due caution and circumspection, then he does his duty and incurs no responsibility; but if he loans the money, either in bad faith or without such care and circumspection, then he diverts and misapplies it, and is responsible at once on his official bond, for the full amount thus misapplied. It would seem that the principles here announced are applicable to the case of a sheriff in taking bond in a sum less than double the value of the goods described in the writ of replevin; and if so, it is the duty of the sheriff to act in good faith, and with due caution and circumspection, then he does his duty and incurs no liability; but if he acts in bad faith or without the exercise of due care and circumspection, a liability on his official bond is at once incurred.

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Supreme Court of Illinois.

MARY C. WILLIAMS v. HIRAM L. HUGURIN.

ERROR TO SUPERIOR COURT OF COOK.

1. The rule deducible from the cases of *Carpenter* v. *Mitchel*, and *Cookston* v. *Toole*, is that the only contracts of a married woman that can be enforced against her, are such as relate to her separate estate, or necessarily incident to its enjoyment.

2. The rule is, that to render the separate estate of a married woman liable, the debt must have been contracted in regard to it, or for her own benefit, on the credit of her own separate property, or where by some appropriate instrument executed by her with a view to make the debt a specific charge upon it.

3. A general engagement to pay a debt contracted by a single bill or note having no reference to her separate property, will create no such charge upon it as can be enforced in a court of equity.

4. In this case, the liability sought to be enforced arose out of the fact that the appellant endorsed the note given by her husband in payment of his own indebtedness. It is silent as to the separate estate of the wife, and it would be making an agreement for the parties which they never contemplated making for themselves to construe the note into a contract to pay out of a particular property.

The opinion of the court was delivered by

SCOTT, J.—This bill was to subject the separate estate of a married woman to the payment of a debt which it is alleged was by implication charged upon it. It is alleged in substance, the husband of appellant executed the note in controversy, payable to the order of appellee, upon which the appellant endorsed her name before its delivery; that she had separate property, over which she exercised the powers of a *femme sole;* that the note was executed and endorsed with the intention of charging it upon such separate estate. The appellant admits she has separate property, that she endorsed the note substantially as charged, but denies that her separate estate received the benefit of the consideration, and alleges it was done solely to secure the indebtedness of her husband; hence she insists it was of no legal or binding effect on her, or her property. The evidence shows appellant was merely endorser for her husband; that she never received any part of the consideration for which the note was

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given, nor was it given in relation to, or for the benefit of her separate estate. It is not claimed, she expressed any intention to charge her separate estate with the payment of the indebtedness of her husband, by any act other than endorsing the note itself. It is insisted the endorsement or guaranty of the note by appellant without any other act on her part expressing an intention so to do, charged her separate property with its payment. This exact question has not heretofore been passed upon by this court. The English cases, most generally follow the doctrine in the case of *Halen* v. *Tennant*, 1 White's Leading Cases in Equity, 324. That was a bill brought by the obligee, on the joint bond of the husband and wife, to enforce payment out of the separate property of the wife. Her separate property was held liable on the principle stated by the chancellor, that, "if a court of equity says a *femme covert* may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements; as for instance the payment of debts, &c." The case rested on the doctrine that a *femme covert*, acting with respect of her separate property, is competent to act in all respects as if she was *femme sole;* and that rule was said to be necessary to support the decision on this subject. The rule adopted in that case was substantially followed in *Murray* v. *Barlee*, 3 Myle & K., 209; and in *Owens* v. *Dickinson*, Craig & Philips, 58; but the conclusion was reached upon a somewhat different process of reasoning, and the relief decreed placed on different grounds. In *Murray* v. *Barlee*, the foundation of this doctrine was said to be this. "The wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot effect it no one can, and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were *discovert*. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. "Thus, if she only executed a bond or made a note or accepted

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a bill, because these acts would have been nugatory if done by a *femme covert* without any reference to her separate estate, it was held that she must have designed a charge on that estate, since in no other way could the instrument, made by her, have any validity or operation. In *Owens* v. *Dickinson*, relief was granted on the principle that the separate property of a married woman being the creature of equity, if she has the power to deal with it, she has the other power incident to property generally, viz: to contract debts to be paid out of it, and inasmuch as her creditors have not the means at law of compelling judgment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied. The difficulty of obtaining a satisfactory reason for the rule may be seen in the language used by the chancellor, where he says: "it is quite clear there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of a particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct according to legal principles to say that a contract to pay is to be construed into a contract to pay out of a particular property so as to constitute a lien on that property. All the authorities however seem to concur in holding there must be an intention manifested to charge the separate estate, otherwise the debt will not affect it. Mr. Story says the difficulty has always been to ascertain to what circumstances in the absence of any positive expression of intention will be sufficient to create a charge on her separate estate, or what sufficient to demonstrate an intention to create a general debt. He states the rule as follows: The fact that the debt has been contracted during coverture, either as principal or surety for herself or her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate, without any proof of a positive agreement or intention so to do. 2 Story Eq. Jur., sec. 1400. The rule no doubt had its origin more in a desire to do justice than in any other satisfactory rea-

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soning. The principle as stated in all the text-books, and which lies at the foundation of the decisions adopting the rule is, that such security executed by a married woman must be supposed to have been made with the intention that they should operate in some way, and no effect could be given to them except as against their separate estates. Hill on Trustees, 424; 2 Story Eq. Jur., sec. 1400. The courts in many of the States, have followed the doctrine of the English cases, but others of equal respectability and authority have held, that a debt contracted by a married woman for the accommodation of another person, without consideration received by her, will not be enforced in equity against her separate property, unless made a specific charge upon it by an express instrument. The authorities showing the departure from the English cases are very fully collated in Hare and Wallace's notes to *Holmes* v. *Tennant*, *supra*. Without entering upon any extended consideration of the conflicting decisions bearing on this question, we think the doctrine of the latter class of cases is more in harmony with our previous decisions, on analogous questions, and with the policy of our laws. At common law a married woman could not enter into general engagements, to pay money that would be personally binding on her; and in *Carpenter* v. *Mitchel*, 50 Ill., 470, it was held, our statute of 1861, had not changed the rule except the power to make contracts, such as might be considered necessarily incident to the right to hold and enjoy her separate property. In *Cookston* v. *Toole*, 59 Ill., 515, it was held, the implication of capacity in a married woman, to contract in respect to her separate property arising under the statute, is an implication of law and not of equity, and therefore all contracts made within the scope of that legal capacity are legal contracts, and cognizable in the court at law. The rule deducible from these cases is, that the only contracts of a married woman that can be enforced against her, are such as relate to her separate estate, as necessarily incident to its engagement. This conclusion would seem to follow as a corollary, from the doctrine of these cases. The reasoning in the case of *Carpentər* v. *Mitchel*, *supra*, is against the right to make a contract which belongs to a *femme sole*, and declare that power is not given to a married woman by the eppress language of the

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law of 1861, nor by its implications. It was said the legislature had not seen fit to confer upon them any such power; and this court would be going beyond the proper limits of its authority, to seek to give it by any forced construction of the statute. The separate estates of *femme coverts*, under our law, are not mere creatures of equity, but are legal estates; and hence the reasoning that lies at the foundation of the English cases can not apply. The principle first announced was, that the execution of a bond, bill or note, by a married woman, was itself construed into our act, to charge her separate property with its payment. This ground of liability was subsequently declared to be untenable, and the liability was placed on the principle that equity will seize the separate estate of a *femme covert*, and appropriate it to the payment of her debts, no matter how contracted, whether by written or parol engagements. Under our laws she may contract in reference to her separate property the same as a *femme sole*, and this fact excludes the idea she may contract in any other manner, and especially when the separate estate is a legal and not simply an equitable one. The mere fact a *femme sole* contracts indebtedness in writing or by verbal engagements creates no special charge upon her property, real or personal, as will constitute grounds of equitable relief. It is a legal liability, to be enforced in the lower courts. The case of *Yale* v. *Dedere*, which was twice before the New York court of appeals, and is reported in the 18 N. Y., 266, and 22 ib. 450, involved the question of the power of a married woman to charge her separate estate, either under the statute or independent of it, and the court held, while the statute of that State conferred upon a married woman the right to hold, convey and devise, her real and personal property, it did not remove her common law incapacity to contract debts; and for that reason her promissory note is void, unless given under such circumstances and in such manner as would induce a court of equity to make it a charge upon her separate estate, independently of the statute. *Carpenter* v. *Mitchel*, *supra*. The case of *Willard* v. *Eastham*, 15 Gray, 328, in an elaborate and well considered case on this subject, the court expressly approves of the doctrine of *Yale* v. *Dederer*, and adds, that when a married woman is a mere surety, or makes the con-

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tract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it. The estate alleged to belong to appellant is a legal one, and whatever contracts she may make in regard to it, she is liable therefor at law. But no contract is proven in relation to her separate property, and it seems to us most illogical, to hold by the mere execution of a single bill or note which contains no reference whatever to her separate estate, she directly or even by implication, intended to make the debt a charge upon it.

The conclusion we have reached, and we think it is sustained by reason and authority, is that to render the separate estate of a married woman liable, the debt must have been contracted in regard to it, or for her own benefit, on the credit of her own separate property, or where by some appropriate instrument, executed by her with a view to make the debt a specific charge upon it. A general engagement to pay a debt contracted by a single bill or note, having no reference to her separate property will create no such charge upon it as can be enforced in a court of equity. Such was the case at bar. The liability sought to be enforced, arose out of the fact, the appellant endorsed the note given by her husband in payment of his own indebtedness. It is silent as to the separate estate of the wife, and it would be making an agreement for the parties which they never contemplated making for themselves, to construe the note into a contract to pay out of a particular property. The facts alleged presenting no grounds for relief in a court of equity, the decree must therefore be reversed and the bill dismissed.

REVERSED AND DISMISSED.

Our statute entitled Husband and Wife, chapter 68 Hurd's Statute, page 576, in force July 1st, 1874, provides: "That a married woman may in all cases sue and be sued, without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced against her as if she were a single woman." This statute can have no application to the vast number of cases that will arise upon contracts, etc., arising prior to July 1st, 1874; and what effect it may have upon contracts made subsequent to July 1st, 1874, has not as yet been adjudicated, and may not be fully settled for years. The act of 1861, has been in force now fourteen years, and the foregoing case presents a new question; new to the courts and new to the profession.

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PROXIMATE AND REMOTE DAMAGES.

Cases are constantly arising in the courts that are controlled by the maxim, "*causa proxima non remota spectatur.*" There are not many of the maxims of the law which touch so closely upon metaphysical speculation. The rule itself is one of universal application, but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate, and when merely remote. Greenleaf in the 2d volume of his Evidence, sec. 256, lays down the rule that "the damage to be recovered must always be the *natural and proximate consequences* of the act complained of." Parsons in his work on Contracts, vol. 2, p. 456, 1st ed., after alluding to the confusion in which the adjudged cases leave this question says: "We have been disposed to think that there is a principle desirable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful if not decisive in all. It is, that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen and was therefore under no moral obligation to take into consideration." The supreme court of Illinois in speaking of this rule in *Fent et. al.* v. *T. P. & W. R. W. Co.*, 59 Ills., 351, say: "We are disposed to regard this explanation of the rule as clearer and capable of more precise application than any other we have met with in our examination of this subject; and it is in substantial accord with what was said by Pollock, C. B., in *Rigby* v. *Hewit*, (cited by the court as *Higby* v. *Hewitt.*) In the notes of cases in the Albany Law Journal, Nov. 14th, 1874, p. 309, it is said: "In the forthcoming volume of Pennsylvania Reports, (vol. 74, p. 316,) is reported *Oil Creek & Alleghany River Railway Co.* v. *Keighron*, an important decision involving the liability of a railroad company for the negligent acts of its servant and also the question of proximate and remote damages. Two cars of defendant railroad company were placed at a station on a steep grade to be filled with oil; the cars were under charge of the oil

company's superintendent, none of the railroad company's servants being present. The superintendent having filled one car detached it to fill another, when the first car ran down the grade and collided with a locomotive, which set fire to the car and burned the house of plaintiff, situated twenty feet from the track. *Held*, that, as between the railroad company and the third persons, they were liable for the negligence of the superintendent as their servant; and that the damage was not too remote. This case is one of unusual interest. Similar cases have been decided, bearing on the question whether the servant was the servant of the railroad company or the oil company. See *Quarman* v. *Burnett*, 6 Mees. & Wels, 499, 509, 510; *Randleson* v. *Murray*, 8 A. & E., 109; *Laugher* v. *Painter*, 5 B. & C., 547; *Dalyell* v. *Tyren*, 1 E. B. & E., 899; *Sproul* v. *Hemingway*, 14 Pick., 1; *Brady* v. *Giles*, 1 M. & R., 494; *Milligan* v. *Wedge*, 4 P. & D., 714; 1 Q. B., 714; *Murphy* v. *Caralli*, 10 Jur. (N. S.) 1207; 13 W. R., 165. Similar cases have been decided bearing on the question whether the damage by fire was too remote. See *Smith* v. *London, etc., Railway Co.*, L. R., 5 C. P., 98; *Berly* v. *Eastern R. R. Co.*, 98 Mass., 414; *Ryan* v. *New York Central R. R. Co.*, 35 N. Y., 210; *Penn. R. R. Co.* v. *Kerr*, 1 Am. Rep., 431; 62 Penn. St. 353; *Toledo, etc., Railway Co.* v. *Pinder*, 5 Am. Rep., 53 Ill., 447; *Turbenville* v. *Stamps*, 1 Ld. Raymond, 264; 1 Salk. 13; *Pantam* v. *Isham*, id. 19; *Kellogg* v. *R. R. Co.*, 26 Wis., 225."

The case of *Tweed* v. *Insurance Co.*, 7 Wallace, 44, was an action brought against an insurannee company to recover for cotton stored in a warehouse and insured against fire, except loss by fire caused by explosion, invasion, &c. An explosion occurred in another warehouse, from which explosion fire was communicated to the Eagle Mills situated on the opposite diagonal corner, and from thence to the warehouse in which the cotton was stored. The court in delivering the opinion of the court said: "One of the most valuable of the *criteria* furnished us by the authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief, the other must be considered too remote. In the present case, we think there is no such new cause. The

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explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another mill, supplies no new force or power which caused the burning. The court in the case, *Fent et. al.* v. *P. W. & W. Railway Co.*, 59 Ill., 349, *supra*, review a large number of the English and American cases, and hold, that the rule is to determine in every instance, whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act, at the time of its performance. If loss has been caused by the act, and it was under the circumstances a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. And that if, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if for example, after its ignition a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible. As sustaining this general view, *Illidge* v. *Goodwin*, 24 E. C. L.,272; *Lynch* v. *Mudin*, 41 E. C. L., 422; *Greenland* v. *Chaplin*, 5 Exch., 451; and see also, cases cited by the court in the Fent case, *ubi supra*. When the negligence of the defendant, in a suit upon such ground of action, is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission, not occurring at the time of the injury, the action is maintainable. *Kerwhacker* v. *C. C. & C. R. R. Co.*, 3 Ohio Stat., 172; *Isbell* v. *The New York and New Haven R. R. Co.*, 27 Conn., 393.

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INTOXICATING LIQUOR—PATENT MEDICINES—INSTRUCTIONS OF COURT.

In *Russell* v. *Sloan*, 33 Vermont, 656, it was held that the law of that State prohibiting the traffic in intoxicating drinks, does not apply to medicinal preparations in which alcohol is used in quantities capable of producing intoxication, such as bitters, tinctures, etc., which are in good faith made and sold for medicinal purposes. But that the rule is otherwise when the intoxicating liquors are intended to be sold and used as a beverage, though disguised by some tincture or preparation, so as to have to some extent, the taste, flavor, or appearance of medicine. Aldice, J., in delivering the opinion of the court, said: "The object of our statutes regulating the sale of intoxicating liquors, is to prevent the use of such liquors as a beverage, and thus to check and if possible to extirpate the evils of intemperance. Hence these statutes are intended to apply to all intoxicating drink. But there is a large class of medicines, bitters and tinctures, used not as beverages, but as medicinal remedies, to which it is quite obvious that these statutes were not intended to apply, although such articles are composed in part of alcohol, and if used in sufficient quantities will produce intoxication. Such articles are usually kept by druggists and are manufactured in good faith as medicines. They are not intended for, and are not used as a drink. Some of them are approved of and recommended by learned and skillful physicians. They vary greatly in their preparation in the amount of alcohol used in them, and in their qualities many of them are believed to be useful in the cure of diseases; many of them are probably worthless or mischievous. Many mixtures of this sort pass under the title of patent medicines, which the auditor finds the preparation here in question to be. But the law makes no distinction in regard to the manufacture, use and sale of medicines, upon the ground that they are or are not the products of quackery. Many quack medicines have a great reputation for curing diseases, and find a great sale.

"To prohibit the sale of these articles for their legitimate

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and real use, as remedies for disease, was not in the object of our legislation in regard to intoxicating liquors. It would be, we think, a narrow construction of these statutes, a mere following of the letter without regard to the spirit and object of the law, to hold that the words, 'intoxicating liquors' should include medicines, or medicinal preparations, when alcohol is used in them in quantities capable of producing intoxication. The practical operation of the statute thus expounded would interfere with the practice of medicine by physicians, and with that freedom in the choice and use of remedies for disease, which every one is entitled to. In practice it would be intolerable if attempted to be enforced. These were not the objects aimed at by the statutes. Wine, brandy, rum, etc., are permitted to be sold as medicines. When, therefore, these medicines, bitters and tinctures, are made and sold in good faith for their true and legitimate use, to prevent or cure disease, we cannot regard them as within the class of intoxicating liquors where sale is prohibited or regulated by law. But when intoxicating drinks intended to be sold and used as a beverage, are by some tincture or preparation slightly disguised, so as to have to some extent the taste, flavor or appearance of medicines or bitters, when in fact they are really meant to be sold and used as intoxicating drinks; such mixtures, however disguised, are within the prohibition of the law. When medicinal names or other plausible and popular titles are used to disguise and cover up the sale of intoxicating drinks as a beverage, it is clear that the articles thus sold are none the less within the class of intoxicating drinks prohibited by the statute, because they seek to avoid the penalties by the use of a specious and fair sounding name. In all such cases it is a question not of law but of fact, whether the pretended medicine is in reality and in good faith, made, sold and used as a medicine, or is only a disguise for intoxicating liquor. This question must be determined upon the evidence. The composition and character of the article, the amount of alcohol in it, and whether it does readily or with difficulty produce intoxication. Whether it is agreeable or nauseous to the taste; whether it is useful or not as a medicine to cure disease; whether it is generally kept and sold by druggists as a medicine; whether it

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is frequently resorted to and used as a beverage. These and similar circumstances would be regarded as evidence tending to determine the question."

It has been held, that unless there be an express exception in the statute, the fact that the liquor is sold by a retailer for medicines is no defense. *Phillips* v. *State*, 2 Yerger, 458; *State* v. *Whitney*, 15 Vermont, 298; *Com.* v. *Kimball*, 24 Pick., 366; *State* v. *Brown*, 31 Maine, 522; *Com.* v. *Sloan*, 4 Cush., 52. It is otherwise however when the liquor is given by a physician to a man in fact sick, and in good faith as a medicine, though charged by the physician in his bill as liquor. *State* v. *Larrimore*, 19 Mo., 391; *Thomasson* v. *State*, 15 Ind., 449. And where the statute makes no exception of sales made for medicinal or sacramental purposes, the court will make the exception in a proper case. And where a physician who administers intoxicating liquor in good faith as a medicine, upon his professional judgment, is not within the meaning of the Missouri statute concerning groceries and dram shops. See 19 Mo., 391, *supra*. A contrary doctrine however, is held in Maine. *State* v. *Hall*, 39 Me., 107. It was held in this case under the Maine law, that neither a physician nor an apothecary, unless appointed by the town as an agent, are authorized to sell spirituous liquors for mixture with medicinal ingredients by the purchaser, although the medicines were purchased at the same time with the liquor. But it must be borne in mind that merely keeping drugs will not authorize the party to sell as an apothecary, he must have skill in the preparation of medicine. *State* v. *Whitney*, 15 Vermont, 298. In *Geppert* v. *State*, 7 Ind., 300, the court say: "We think, according to the evidence, that the liquor in question was not sold for a medicinal purpose, though it may have been *purchased* for such; and that the defendant was rightly convicted. It does not appear that the object for which the liquor was purchased was made known to him." See *Donnell* v. *State*, 2 Ind R., 658. In Ohio any person may lawfully, *in good faith*, give away intoxicating liquor for medicinal or other purposes, and may lawfnlly sell them in any quantity for such purposes, to be drank elsewhere than where sold, but he can not lawfully *sell* them, (except such as are specially excepted by the

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statute), *to be drank where sold*, for any purpose. *Schaffner* v. *State*, 8 Ohio St., N. S., 643. The administering of liquors to a patient by a physician, can not properly be denominated a sale. (Same case.)

From an examination of the authorities above cited, it will appear, except in the States where it is decided that the courts will make no exception, that in order to justify a sale by a druggist, it must appear from the evidence that the party making the sale is an apothecary or druggist; that the sale was made in the regular course of such business; that the sale was made for medicinal or sacramental purposes, and that the purchase was made for such purpose; and that both, the sale and purchase, was in *good* faith for such purpose. And, in cases of patent medicines, tinctures, &c.; in the case of *The State* v. *Laffer*, West. Jur., Iowa, Sept., 1874, the court instructed the jury as follows: "If you find that the defendants sold any of the intoxicating liquors named in the indictment, at the times and places named therein, notwithstanding they may have put into it roots and tinctures, unless it changed the nature or character of the liquors, so that it was no longer whisky or brandy, or whatever it may have been originally at the time of the sale, it was a violation of law. If its distinctive character as an intoxicating liquor was so destroyed that it could not be used as a beverage, and it became in fact a medicine, to be used for diseases, and of such a character that it could not in reason be styled or used as an intoxicating drink, its sale was not a violation of law." It was held in the appellate court, that this instruction correctly stated the law. The utmost good faith will be required, in order to bring the case within the rule, not only on the part of the seller, but on the part of the purchaser. Where no exception is made by the State, and the exception must be made by the court, in order to bring the case within the exception, the burden of proof will be on the defendant, to show himself to be within the exception, and no shift or device will enable the party to bring himself within the exception.

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UNDUE INFLUENCE OVER TESTATORS.

The test of undue influence is fraud. The law holds the procuring of the execution of a will through undue influence to be a fraud, and like all other frauds it must be affirmatively proven either by direct or circumstantial evidence, for every presumption is in favor of innocence. We have deduced the following principles from some of the adjudged cases on this subject.

1. In the case of a will, the influence which the law condemns as unlawful must be such as amounts to force and coercion, destroying the free agency of the testator. See *Parfitt* v. *Lawless*, 21 Weekly R. 200.

The will is set aside or refused probate in this class of cases on the ground that it is not an honest will—that it does not reflect the unbiased intent or wishes of the testator, but, on the contrary, had been extorted or procured from the deceased in the weakness or imbecility of old age or disease, or by artifice, deceit, or imposition, or by persistent importunity, amounting to a species of coercion or moral duress. Undue influence in this sense is a fraud. The will is set aside upon the ground that its execution was procured by fraud and imposition, and for that reason, and upon that ground, it is not the act, deed or will of deceased. Upon no other ground has the court a right to set aside a deed or will executed by a person of sane mind or memory, when the execution of the same was not procured, and the free agency of the party overcome by some constructive coercion, duress or fraud. *Kinne* v. *Johnson*, 50 Barb. 70; *Tyler* v. *Gardener*, 35 N. Y., 610; *Tyson* v. *Tyson*, 37 Md. 567; *Williams* v. *Goude*, 1 Hagg. Ec. R. 580; *Eadie* v. *Simpson*, 26 N. Y. 11; *Mountain* v. *Bennet*, 1 Cox, 355. The law is well settled that the influence exercised (in procuring a will) which sets aside a will, must be such as destroys free agency; there must be imprisonment of the body or mind; and unless the jury are satisfied that there was such physical force exercised, arising from actual duress or imprisonment of the body, or such mental force, arising from threats, as prevented free agency, they were not to consider the influence exerted as improper. *Browne* v. *Molliston*, 3 Whart. 131.

2. Mere persuasion, however persistent, does not amount to undue iufluence. Influence and persuasion may be fairly used. A will may be honestly procured. Many wills indeed would be destroyed if you inquire into the degrees of influence and persuasion. A will procured by circumvention will be set aside; but a will procured by honest means, by acts of kindness, attention, and importunate persuasion, which delicate minds would shrink from, would not be set aside on that ground alone. *Miller* v. *Miller*, 3 S. & R., 269 Neither affection nor flattery, nor honest persuasion, nor capricious partiality, destroys the validity of a testamentary act. (4 Burns' Ec. L. 70) Influence, to vitiate an act, must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. *Mountain* v. *Bennet*, *supra*. Advice, persuasion, or entreaty, does not constitute undue influence. *Rabb* v. *Graham*, 43 Ind. 9. In the latter case it was proved that one of the sons said, "he

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ought to make a will and leave his property to the boys, and not leave the girls anything." This the testator did, but his will was sustained.

3. Love, affection, and gratitude are not grounds from which undue influence may be inferred.

The influence arising from gratitude, affection, and esteem is not undue. *Kinne* v. *Johnson*, *supra*. Kind offices aud faithful services, in ordinary course, tend to influence the mind in favor of the party thus acting; and care should be taken not to confound the natural action of the human feelings, in this respect, with positive dictation and control exercised over the mind of the testator. *Weir* v. *Fitzgerald*, 2 Bradf. 67. If a wife, by her virtue, has gained such an ascendancy over her husband, so rivited his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the rest of his family. *Small* v. *Small*, 4 Grenl., 22. The influence of a wife, the result of a long life of devotion to her husband's happiness, may be exercised in giving direction to his disposition of his property, and that disposition may be at variance with the wishes and disposition of the husband, yet there would be nothing in that to invalidate his will. Persons standing in those near and dear relations are allowed to exercise the influence they acquire. *Zimmerman* v. *Zimmerman*, 23 Penn. 378. It would be extraordinary if the influence of affection and warm attachment is to take away the power of benefiting the object of that regard. *Williams* v. *Goude*, *supra*. To imply fraud from filial virtue would be monstrous. *Bleecker* v. *Lynch*, 1 Bradf. 471. The influence may have been gained by unwearied assiduity, and with the expectation and desire to have a remembrance and reward in the will, and this expectation may have been known to the testator, and even the amount of the legacy discussed between the legatee and himself; and it may be true that the testator was more influenced by the mind of the legatee than his own mind, or even that he was morally incapable of acting contrary to what he believed the will of his best earthly friend; but all this amounts not to undue influence. 1 Redfield on Wills, 516.

4. The law will not infer undue influence merely from illegal cohabitation. *Rudy* v. *Ulrich*, 8 Am. Rep., 241.

5. Nor from the fact that the principal beneficiaries are those by whom the testator was surrounded, and with whom he stood in confidential relations, at the time of the execution of the will. *Wilson* v. *Moran*, 3 Bradf., 185.

6. Nor even when the principal beneficiary is one who, for years, had had exclusive management of the testator's property. *Reynolds* v. *Root*, 62 Barb., 251.

7. Nor when the provisions of the will, for the benefit of such persons, may seem grossly unreasonable, or unequal. *Brown* v. *Mattison*, 3 Whart. 131; *Jackson* v. *Jackson*, 39 N. Y., 153; *Clapp* v. *Fullerton*, 34 id. 97; *Bleecker* v. *Lynch*, *supra*.

8. Nor from the mere fact that the will did not originate with the testator. Burns' Ec. Law, 70.

9. Mere weakness of intellect does not prove undue influence. *Reynolds* v. *Root*, 62 Barb., 251.—*Albany Law Journal*.

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THE GREAT FLAGLOR SUITS.

Bill of Review—Decree by consent. Decree by consent, will only be set aside by Bill of Review, in cases of fraud or mistake. Partition—Answer consenting to decree—Authority of attorney to appear and file answer—Conveyance and agreement as to the effect of the decree—Settlement of property upon children—The effect of notice of decree, and agreement appearing of record—The effect of such notice on subsequent purchasers for value—Will—Construction—Life estate—Modification of the law of estates tail by 6th sect. Conveyance Act.

These cases present a history of one of the most remarkable struggles on record for the title to real estate. A large amount of Chicago real estate involved in the controversy. There has been no litigation in relation to Chicago real estate more perplexing, or involving points of greater interest—whether to the parties concerned, or the public at large, than the suits known as the great Flaglor suits. The history of these suits may be stated thus: In December, 1848, one Augustus Garrett departed this life, leaving a will, by which he directed the income from his real estate, after the payment of his debts and legacies, to be divided between his wife, Eliza, his two sisters, Mary Banks and Letitia Flaglor, and his two nephews, James and Thomas G. Crow, in certain specified proportions, and further directing, that on the death of his said wife and sisters, the real estate should be divided between Charles D. Flaglor, son of Letitia, and said

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James and Thomas Crow, or if they should be dead, between their children *per stirpem*. The widow renounced the will, and thereby became entitled to one half of the realty in fee, leaving only one half to vest under the will in the manner above stated. The parties interested, agreed to procure a partition without waiting for the death of the widow and sisters; and for that purpose Eliza Garrett, the widow, and the said James and Thomas Crow, filed a bill at the March term, 1851, of the Cook county circuit court, making Charles D. Flaglor, his two children, Lucy Louisa and Elizabeth, and all other parties interested, parties defendant.

The bill set forth, that the widow, the sisters, Mary Banks and Letitia Flaglor, and the nephews, James and Thomas Crow, and Charles D. Flaglor, had agreed upon a partition of the estate, which was set forth in the bill, and that the *Flaglor interest was to go to Letitia during her life*, then to Charles D. if he survived her, *during his life*, and then to his children in fee. Under the will, Charles D. Flaglor, was clearly entitled to the fee after the death of Letitia. Charles D. Flaglor, by Arnold & Lay, his solicitors, filed his answer admitting the allegations of the bill, and desiring the prayer of the bill should be granted. A decree was entered in accordance with the prayer of the bill. The decree finding that Letitia Flaglor was entitled to a life estate, then to Charles D. Flaglor, if he survived her, *during his life*, then to his children in fee. When in fact, by the terms of the will as above stated, Charles D. was entitled to the fee, on the death of Letitia, and upon this decree the controversy arose. At the May term, 1853, Charles D., filed his bill of review setting forth all the above details, and alleging error, appearing on the face of the record in the former decree, in that the decree gave Charles D. Flaglor, only a life estate, when by the will he was entitled to the fee. A decree was entered reversing the former decree, so far as related to the Flaglor interest, and giving the fee to Charles D. Flaglor. From that decree Elizabeth Flaglor, daughter of Charles D., prosecuted a writ of error, and the case is reported in 40 Ill., 414, *Flaglor* v. *Crow's Ex'rs, etc.* Certain persons were made parties to this writ of error as *terre tenants*, who filed a plea claiming to hold as innocent, purchas-

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ers under Charles D. Flaglor, after the decree upon the bill of review. This, as the sequel will show, presented another point of controversy. The court, on page 417, say: "However much we may regret the possible consequences to innocent purchasers, we are obliged by the plainest and best settled rules of law to reverse this decree. That a decree, entered by consent of parties can not be set aside by bill of review, without showing fraud or mistake, is incontrovertible, (2 Dan. ch. Pr. 1179; 3 Id. 1602; Adams' Eq., 400.) This is not denied by the counsel for the defendant in error, but it is urged that the consent herein given was simply that partition should be made, not this particular partition. But the facts we have already stated, as appearing on the record show beyond all question, that this position is untenable. This specific partition was set out in the bill as having been agreed upon by the parties, and the court is prayed to confirm it; and the consent of Charles D. Flagler appears by his answer, and by both the decrees." The court on page 418, close the opinion as follows: "We must reverse this judgment, but we decide nothing, as to the rights of purchasers from Charles D. Flaglor. That must be left for future adjudieation."

This case was submitted at the April term, 1866, and I apprehend the opinion was filed at the January term, 1867. Letitia and Charles D. Flaglor, and all his children except Elizabeth died, and she on the 24th day of February, 1867, filed a bill making the various persons holding or claiming an interest in the property parties, and was decided by the superior court at the February term, 1872, in which the court, His Honor Judge Gary, delivering the opinion of the court for His Honor Judge Jamison, and rendering a decree for the complainant.

This case was argued by *Arthur W. Windett*, counsel for the complainant, and *Beckwith, Ayers & Kales*, for the defendant Wadhams, and *George Herbert*, for the defendants, Engle & Day.

From the decree rendered by the superior court of Cook county, the defendants carried the case to the supreme court of the State where it was again ably and elaborately argued by the same counsel, at the September term, 1873; and on the 20th of June, 1874, the supreme court filed their opinion.

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The court per Walker, J., say: "The effect and force to be given to the decree of partition involved in this case was previously before this court, under the title of *Flaglor* v. *Crow*, 40 Ill., 414, where the facts are stated, in part, out of which this controversy arises. It now appears that Letitia, the mother of Charles D., died, leaving him surviving her; that he had, however, entered into an agreement with Mrs. Garrett, the widow of testator, and the two Crows, after the rendition of the decree in partition, by which each was to receive the portion assigned to them by the proceeding in partition, and each undertook and bound themselves to pay debts and legacies, which were charged upon the land in specified proportions, and executed releases interchangeably to each other for the portions set off to each. Letitia Flaglor, the mother of Charles D., joined him in the execution of the quit-claim deeds and the agreement. In the agreement referred to, it was declared that the lands deeded to Charles and his mother should be subject to one-sixth of the debts of Garrett's estate, and to one-third of the actual cash legacies and annuities in the will mentioned, 'and to the whole and entire interest of the child and children, and the descendant or descendants thereof of Charles D. Flaglor, which may herein survive, in said estate of said Garrett, which, under said will such child or children, descendant or descendants, may have or any time may be entitled to, which said interest of such child or children or descendants is hereby declared and agreed to be charged upon the lands in said deed to the said Letitia and Charles D. Flaglor mentioned.'

"The agreement further recites: 'And the said Letitia and Charles D. Flaglor, and Frederick T. Flaglor, husband of said Letitia, hereby assume to satisfy said interest of any such child or children, or descendants thereof, which they may be entitled to, under and by the terms of said will, and to save and keep harmless the share and portions of said real estate, so deeded to said Eliza Garrett, James Crow and Thomas G. Crow, from all claim and claims which any such child or children of said Charles D. Flaglor may have or become entitled to under said will, or the decree of any court now made or hereafter to be made.' The deeds and this agreement were duly recorded on the 30th of May, 1851.

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"On the 17th of July following, Charles D. Flaglor filed his petition in the surrogate court of Orange county, New York, to be appointed guardian for his daughters Elizabeth and Lucy Louisa. In it he stated the former was two years old on the 13th of the previous March, and Lucy Louisa was seven months old on the 10th day of that month. He states that the minors are entitled to certain estate and property by the death of their granduncle, Augustus Garrett; that the property consists of certain moneys which will arise from the sale of certain real estate owned by Augustus Garrett at the time of his death, to be sold by his executors; that he believed their interest would not exceed three thousand dollars; and that the minors are not entitled to any income from the estate until after the death of Letitia Flaglor, their grandmother, and of himself, in whom the use of the money is given during their lives.

"On the 2d day of February, 1852, Charles D. Flaglor sold to Hiram P. Moses and Seth Wadhams the N. ½ of block 73, lying east of Ellsworth street, for $6,500, and gave them a bond for a conveyance by a deed with covenants of warranty on the payment of the money.

"On the 17th day of February, 1853, Charles D., Letitia, and her husband, conveyed the land by warranty deed to Moses and Wadhams. Subsequently, on the 16th day of April, 1853, Charles D. filed a bill of review, and he made the parties to the partition proceedings, defendants. On a hearing, the relief sought was granted, and the record was brought to this court, where the decree was reversed. On the 17th day of December, 1853, Letitia Flaglor and her husband conveyed the property now in controversy to Charles D., and he thereby acquired a life estate in the portion not conveyed to Moses and Wadhams. He, on the 18th day of January, 1854, conveyed the N. ½ N. ½ block 73, west of Ellsworth, to Moses, and on the same day he conveyed to Wadhams the S. ½ N. ½ block 73, west of Ellsworth street. This was all done before a decree was rendered on the bill of review filed by Charles D. Flaglor.

"On the 10th day of November, 1855, Moses executed a mortgage to Ryerson and Miller on the undivided half of N. ½ block 73, east of Ellsworth street, and conveyed the undivided

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half N. ½ N. ½ block 73, west of Ellsworth street, and the undivided half of an undivided half of N. ½ block 73, east of Ellsworth street to Christian Engle. His creditors and their attorneys, prior to 1862, under judgment and other proceedings, acquired the title of Moses to this land, and conveyed the same to Augusta Engle, wife of Christian, and they, on the 14th day of October, 1863, mortgaged the same to Calvin Day, to secure $20,000. Letitia and Charles D., and all of his children, except Elizabeth, died, and she, on the 24th day of February, 1867, filed this bill, making the various persons holding or claiming an interest in the lands, parties. During the pendency of the suit she died, having devised the land to her mother, Lucy C. Flaglor, since intermarried with one Gay, and the suit has since progressed in her name. On the hearing, the court below granted the relief sought, requiring the subsequent purchasers from her father to release their title to her, and required them to account for the rents and profits. To reverse the decree, this appeal is prosecuted.

"It is urged that the decree in the partition suit was not in accordance with the terms of the will, and is palpably opposed to any construction that can be given to it, and that the decree is unjust and should not be enforced. That decree was manifestly entered by consent of all parties to the proceeding. Complainants gave the construction to the will that the mother first took a life estate in the portion devised to her, and on her death to pass to Charles D. for life, and at his death to go to his child or children, or their descendants, in fee, if living, and in default of such issue at his death, then in fee to James and Thomas Crow. This they expressly stated in their bill was the provision contained in the will, and prayed that partition be made, allotting to Letitia, Charles D. and his children their shares on these terms and conditions. To this bill Letitia, her husband, and Charles D. filed their answer, and in it admitted the truth of the allegations in the bill, and prayed that the partition be made according to the prayer of the bill, and this answer was regularly signed by attorneys in good standing in this court.

"The decree was so made and the partition had, and this court held, in the case, when here on the bill of review, that it

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was final and conclusive, and could not be set aside on a bill of review except for fraud or mistake. And with that decision we are satisfied, and only strengthened in the conviction of its correctness on further and more mature reflection. Again, Charles D., in the most solemn manner, fully recognized and ratified the validity of the decree, after the partition was rendered, by entering into the agreement executed by the parties when they executed the deeds interchangeably to carry into effect the decree. By that agreement, he declared that the property released to himself and his mother should be subject to the payment of a specified portion of the debts against Garrett's estate, and of cash legacies and annuities, and charged with any interest which any child or children of his or their descendants might be entitled to under the will, or which they have or may become entitled to under the will or the decree of any court, now made or hereafter to be made. In this he knew what he was doing, and the effect it would produce, as he subsequently stated to parties in New York that he only held a life estate in the property, and that at his death it would descend to his children, and that he had no power to sell more than his life estate in the premises. And he in his application for letters of guardianship—though he does not describe the intermediate estates, or correctly state their interest in the property—he says that he is only entitled to its use during his life, and on his death the property will belong to his children. Again, he executed this agreement as a part of the means of effecting the partition; in fact, as its consummation.

"He seems to have been a shrewd, intelligent man, and could not have otherwise than known the effect of his act in signing this agreement which is under seal. And there is no pretense that there was any fraud or mistake in its execution. Even if, as appellants claim, he did not employ counsel, and they were not authorized to enter his appearance and consent to the decree—but the evidence, we think, shows they were—he fully ratified all they did by deliberately executing this deed. If there were irregularities in any step previously taken in the proceedings for partition, he by this instrument waived them, and effectually estopped not only himself but his grantees thereby. But, independent of the decree, suppose he had by that agreement

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made in terms the same declaration of rights in his children that was contained in the decree, would any one doubt that he thereby declared a trust in favor of his children that would not only bind him for its execution and render his grantees chargeable, purchasing with notice? We presume that no one would contest the proposition. And the reference to their interest under the will and the decree construing and fixing their rights was the same as if written out in the deed.

"This agreement, declaring the rights of his children in the land as fixed by the decree, was with the deed to his mother and himself, placed on record simultaneously, and thereby became notice of the rights of the children to all the world. And, as Moses, Wadhams, Engles and others, purchased either directly or remotely from him after this agreement was placed on record, they stand charged with notice, and took subject to the rights of the children. But even if this agreement had not been made, still they would have been charged with the decree of the court; and that fixed the rights of the children. And we think the effort to prove that Arnold and Lay had no power to enter Charles D. Flaglor's appearance and consent to the decree failed; but on the other hand, the presumption is, from the fact of their appearance, that they had authority, and the evidence, we think, shows they had. The decree was then binding on the parties, and, until reversed, was conclusive of their rights as therein found and adjudicated. This being so, and the children being minors, they could not consent to any change which could in the slightest degree impair their rights. Nor did their father possess any such power, nor could he or the other parties to the agreement change the decree of partition so as to deprive them of or impair their rights as determined by the court. The decree fixed their rights, and none but the court, before the decree was enrolled, could change the findings or adjudications contained in the decree. So that Charles D. and those claiming under him are bound by the decree and the agreement, notice of both of which they stand charged by the records.

"It is assumed that Charles D. was greatly wronged by the construction put upon the will in the decree. We are unable to see in what manner. If a man voluntarily settles property on

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himself for life, in remainder in fee, or if he consents to a decree which does the same thing, in what is the wrong, or in what does the injustice consist? A man has the undoubted right to so dispose of his property, nor is it supposed to be immoral, unjust, or contrary to sound policy. And that Charles D. Flaglor did, in this case, we think is absolutely shown by the evidence. In fact, the record of the court rendering the decree imports absolute verity until impeached in an appropriate manner, which is not done in this case. Nor can it be done on loose, indefinite and unsatisfactory evidence. And the evidence in this case, is of that character.

"There is great hardship on Moses, Wadhams, and the other purchasers. But under the stern and unbending rules of law, they stand charged with notice of the title now held by appellee, which was in the children of Charles D. at the time they purchased of him. They then knew, or are conclusively presumed to have known, that the fee was in his heirs (children), and that they were purchasing but a life estate; and that when it should fall in, the heirs (children) of Charles D. could claim and recover the fee. This is well and uniformly recognized law, from which courts cannot depart. And the rule is well recognized that parties who hold over after the termination of the life estate must account for rents and profits to the remainder-man, being allowed for taxes, repairs, etc. And we see no objection to the manner in which the court below directed the account to be taken and stated. The decree provides for the allowance of all proper deductions that may be proved.

"The doctrine contended for by appellants, that, on filing a bill to execute a decree, the court will deny relief when it is seen the decree is unjust, does not apply to this case. We have seen that there is no injustice in a man's settling his real estate upon himself for life, and in remainder to his children; and that it does not matter whether it is done by deed or by decree. As to the parties to that decree, we perceive no injustice, and it can not be contended that there is injustice in executing it against purchasers or incumbrancers with notice. Hence we perceive no obstacle, as supposed, to the execution of the decree. On a careful consideration of the entire record, and the legal

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propositions involved, we are satisfied that there is no error in the decree, and it must be affirmed."

During the pendency of the suit Elizabeth died, and she, having devised the lands in question to her mother, Lucy Flaglor, since intermarried with one Gay, and the suit has since progressed in her name, so that when the case is reported it will be reported as *Wadhams et. al.* v. *Gay.*

THE RAILROAD LEGISLATION OF ILLINOIS.

The main purpose of this article is to present in an orderly manner under consecutive propositions, and with but little comment, the authorities, collected mostly from the decisions of the Supreme Court of the United States, and from the opinions and writings of jurists of national reputation, which sustain the constitutionality of the railroad legislation of this State.

The statute on this subject, is entitled, "An Act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto."—(Rev. Sts. of Ill., 1874, pp. 816–820.)

The third section of the act provides: "If any such railroad corporation shall charge, collect, or receive, for the transportation of any passenger, or freight of any description, upon its railroad, for any distance, within this State, the same, or a greater amount of toll or compensation, than is at the same time charged, collected or received for the transportation, in the same direction, of any passenger, or like quantity of freight of the same class, over a greater distance of the same railroad, * * * all such discriminating rates, charges, collections or receipts, whether made directly, or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act."

The eighth section provides: "The railroad and warehouse commissioners are hereby directed to make, for each of the rail-

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road corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights and cars on each of said railroads; and such schedule shall, in all suits brought against any such railroad corporations, where, is in any way involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges, for the transportation of passengers and freights and cars, upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules. When any schedules shall have been made or revised, as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks, in some public newspaper published in the city of Springfield, in this State."

The fourth and fifth sections provide that any railroad corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, "shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars, for the first offense;" and that the fines provided for "may be recovered in an action of debt, in the name of the People of the State of Illinois, and there may be several counts joined in the same declaration as to extortion and unjust discrimination, and as to passenger and freight rates," etc.

In support of the validity of this legislation, the following propositions are submitted:

I.

IT IS THE DUTY OF THE GOVERNMENT TO PROVIDE SUITABLE HIGHWAYS FOR THE CONVENIENCE OF THE PUBLIC. IN OTHER WORDS, THE MAKING AND THE MAINTENANCE OF HIGHWAYS ARE GOVERNMENTAL AFFAIRS.

Vattel says: "One of the principal things that ought to employ the attention of the government, with respect to the wel-

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fare of the public in general, and of trade in particular, must relate to the highways, canals," &c. (Book I, ch. 9, § 101.)

In *Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 18 Wend. 47, senator Maison, in commenting on this proposition of Vattel, adds: "That the government have not only the power, but that it is most emphatically their duty and interest, to construct railroads where the public interest and convenience demand them, can not admit of a doubt."

And in *Olcott* v. *Supervisors*, 16 Wall., 696, the Supreme Court of the United States, per Strong, J., say: "The question now is, whether, if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. *They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them.* Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf."

II.

THE GOVERNMENT MAY PERFORM ITS DUTY IN RESPECT OF HIGHWAYS THROUGH THR INSTRUMENTALITY OF CORPORATIONS.

In the *Slaughter-house* cases, 16 Wall., 64, the court, per Miller, J., say: "If this statute (under consideration) had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised, as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation *and on the public would have been the same as it is now.* Why can not the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing. That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to cre-

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ate such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate."

And in *Railroad Company* v. *County of Otoe*, 16 Wall., 673, the court, per Strong, J., say:

"No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature, or to some law that authorized a municipal division of the State to construct or maintain them at its own expense. They are the creatures of law; whether they are common county or township roads, or turnpikes, or canals or *railways*."

III.

RAILROADS ARE PUBLIC HIGHWAYS.

In *Olcott* v. *Supervisors*, 16 Wall., 694, 696, the court say:

"That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts, ever since such conveniences for passage and transportation have had any existence. * * * * * It is said that railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. *In their very nature they are public highways.* It needed no decision of courts to make them such. True, they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by

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judicial decision. A railroad built by a State no one claims would be any thing else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. *Yet it is the purpose and the uses of a work which determine its character.* And if the purpose is one for which the State may properly levy a tax upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of opening it upon the municipal divisions of the State."

IV.

THE USE OF A RAILROAD IS A PUBLIC ONE.

In *Inhabitants of Worcester* v. *Western Railroad Corporation*, 4 Met., 566, the court, per Shaw, C. J., after citing several provisions of the act of incorporation, say:

"From this view of the various provisions of the law, by which the rights and duties of the Western Railroad Corporation are regulated, it is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes therefore, like a canal, turnpike or highway, *a public easement.* The only principle, on which the legislature could have authorized the taking of private property for its construction, without the owner's consent, is, that it was for the public use. Such has been held to be the character of a turnpike corporation, although there the capital is advanced by the shareholders, and the income goes to their benefit. *Commonwealth* v. *Wilkinson*, 16 Pick. 175."

And in *Olcott* v. *Supervisors*, 16 Wall., 694, 695, the court say: "Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a State legislature may au-

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thorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use. And the reason why the use has always been a public one, is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the State courts.
* * * * * * * * * * * *
Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. *No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as* publici juris."

V.

A PUBLIC USE NECESSARILY IMPLIES A STATE USE, OR A NATIONAL USE, IN FURTHERANCE OF A STATE OR NATIONAL DUTY.

In a note to the case of *Allen* v. *Inhabitants of Jay*, published in the August No., 1873, of the American Law Register, Judge Redfield, on page 497, says: "Sovereign power disclaims all aid, and, where it exists, requires none. *It is a correlative of some public duty, like that of furnishing highways for intercommunication*, the administration of public justice, both civil and criminal; the making of laws and their execution; public education; the administration of the police and of punishment under the criminal laws; the public health; supplying towns and cities with pure water; the postal service and the public defense; and some others of like nature. These are all public uses, for which taxation may be lawfully imposed, and the right of eminent domain exercised by that department of the

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government, state or national, upon which the public duty rests. *Hence nothing can fairly be regarded as a 'public use', unless it be a state use, or a national use, in furtherance of a state or national duty.*"

VI.

A PUBLIC USE IN FURTHERANCE OF A PUBLIC DUTY MUST BE CONTINUOUS IN ITS NATURE, AND SUCH USE CAN NOT BE SECURED TO THE COMMUNITY UNLESS IT REMAIN SUBJECT TO PUBLIC CONTROL.

In *Pratt* v. *Brown*, 3 Wis., 613, 614, the theory of the exercise of the right of eminent domain is well illustrated by the court. The legislature is represented as speaking to the corporation as follows:

"We have not the power to authorize you to take the property of your neighbor and convert it to your own use, even though you pay him what our tribunals may deem a reasonable compensation, but we have the right to take it for the public use on providing for compensation. We will therefore call the use of it the public use, through you as *our agent*, and you may seize and use it in behalf of the public. * * * * * * * Here is no delegation of the right of eminent domain, for it can not be delegated to private persons for private purposes. But the whole theory is, that the government takes the land *and holds it for the public use;* for if the taking, the holding and the use be once admitted to be private, the whole fabric of justification crumbles to pieces. It is the *continuous exercise of the sovereign power*, condemning and appropriating the private property of the individual to the public use."

In *West River Bridge Company* v. *Dix*, 6 How., 546, Woodbury, J., in considering the nature of the public exigency connected with roads which justifies the application of the principle of eminent domain, says: "The uses must be for the people at large,—for travellers,—for all,—must also be compulsory by them, and not optional with the owners,—must be a right by the people, not a favor,—*must be under public regulations as to tolls*, or owned, or subject to be owned, by the State, in order to make the corporation and object public, for a purpose like this." In support of this proposition, he cites among other authorities

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the case of the *Louisville, Cincinnati and Charleston Railroad Company* v. *Chappell*, 1 Rice, 383, 398, where the court, per Richardson, J., after discussing the commercial and international character and objects of railroads in general, and of this one more especially, say: "But take another point of view, which I can not help thinking of lasting importance. Such a railroad as ours, should be held as a highway on account of its great objects; and for the same reason, *to be kept under public control.* Is it not wise to hold such a company, as the guardians, or lessees, of a great highway, endowed with a public franchise; yet subject to the control which their purposes indicate as necessary and proper for such an establishment, and which the general right to use the road absolutely requires? Such a road must be held as a part of the public domain, farmed out to individual men, for its practical administration and order alone—and if placed aloof from such control, it would inevitably become suspected of partiality, and odious to the people."

In *Whiting* v. *Sheboygan & Fond du Lac Railroad Company*, 25 Wis., 194–197, the court, per Dixon, C. J., say: "It (eminent domain) is a power which must be exercised by the government or sovereign, and for the public use only. It can not be delegated. '*The public use*', says Judge Cooley, in his excellent treatise on Constitutional Limitations, 531, '*implies a possession, occupation and enjoyment of the land by the public, or public agencies.*' * * * * * * * And in the leading case of *Railroad Co.* v. *Chappell*, cited by Judge Woodbury, and likewise by counsel here, it is said that a railroad to be deemed a highway should be *kept under public control.* The public use, therefore, which has been held to justify the application of the doctrine of eminent domain in the case of these railroads owned and operated by private individuals, consists in the fact that the owners can not, without reasonable excuse, refuse to receive and transport passengers and freight when offered, at usual rates, and in the fact that *the State retains the power to regulate and control the franchise, and limit the amount of tolls which it shall be lawful for the owners to charge. The use consists in these facts and these alone.* And as a man may be said to possess and enjoy the estate of another, the use of which by

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that other he may regulate and control, so that it shall not be turned to his detriment or disadvantage, so the public, through this reserved power of the State, may be said to possess and enjoy the land condemned for use by these railroad companies."

In *People* v. *Salem*, 20 Mich., 482, the court, per Cooley, J., after stating that an important consideration in the case of eminent domain, is the necessity of accomplishing some public good which is otherwise impracticable, say: "It is proper, however, to add the remark, that even where the necessity is conceded, I do not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, *unless the State in permitting it reserves to itself a right to supervise and control the use by such regulations as shall ensure to the public the benefit promised thereby*, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality or unreasonably selfish action on the part of those who only on the ground of public convenience and welfare have been suffered to make the appropriation. * * * * * * Except that the necessity is wanting, there would be the same justification for the condemnation of lands for stables for the public draymen of a city, as for a way for a railroad; *the like power of regulating the use existing in each case, and the purpose in one being public in precisely the same sense as in the other.*"

And in *Commercial Bank* v. *City of Iola*, 2 Dillon's C. C. R. 361, decided in 1873, Dillon, Circuit Judge, says: "The Supreme Court of the United States, in sustaining the validity of legislative acts authorizing municipal aid to railways, place it upon the distinct ground that highways, turnpikes, canals and railways, although owned by individuals under public grants or by private corporations, are *publici juris;* that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the State, in order to facilitate transportation and easy communication among its different parts. (*Rogers* v. *Burlington*, 3 Wall., 654; *Mitchell* v. *Burlington*, 4 Wall., 270; *Railroad Company* v. *Otoe County*, 16 Wall., 667.) Therefore it is that in favor of such improvements the State may put forth its

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right of eminent domain, and also as now established by judicial decisions, unless the right be denied it in the constitution, its power to tax. That these acts may lawfully be done is because, *and only because the use is a public one; public in its nature, and hence these works are subject to public control and regulation*, notwithstanding they may be constructed under legislative authority and be exclusively owned by private persons or corporations."

These authorities show the inseparable relation between the exercise of the power, called the eminent domain of the State, and the right and duty of the State to supervise and control the use for which private property is taken and appropriated by the exercise of this power. The constitutional exercise of the power of eminent domain necessitates the keeping of property for public use, as well as the taking of it for such use. The eminent domain being a sovereign power is inalienable; and does it not inevitably follow that the right and duty of the government to supervise and control the use for which private property is taken by virtue of the sovereign power of the State, is also inalienable?

VII.

THE RIGHT TO DETERMINE WHAT RATES OF CHARGES SHALL BE PAID TO COMMON CARRIERS BY THE COMMUNITY FOR THE TRANSPORTATION OF PERSONS AND PROPERTY OVER PUBLIC HIGHWAYS IS A GOVERNMENTAL POWER.

By the term governmental, is here meant political or legislative, in distinction from judicial power.

In *Kirkman* v. *Shawcross*, 6 Term. R., 17, Lord Kenyon, C. J., said: "They (common carriers) have no right to say they will not receive any goods but on their own terms; I believe there is an act of Parliament giving power to the justices at the Quarter Sessions to regulate the price of the carriage of goods."

In another case cited in 10 Mees & Wels., 417, Lord Kenyon said: "There are acts of Parliament which authorize justices of the peace to fix the rates to be taken by carriers, and I have known instances of applications to the Sessions for that purpose." For the language of these acts see Bacon's Abridgment, Carriers (D).

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In *Gibbons* v. *Ogden*, 9 Wheat., 203, Chief Justice Marshall, in delivering the opinion of the court, says: "They (inspection laws) form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as *laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.*, are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, *they remain subject to State legislation.*"

In *Ogden* v. *Saunders*, 12 Wheat., 258, 259, Washington, J., in discussing what constitutes the obligation of a contract within the meaning of the constitution, says: "And if it be true that this (natural or universal law) is exclusively the law to which the constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For, what are *laws of evidence*, or which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, *and those which limit the fees of professional men, and the charges of tavern keepers*, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts?"

In these opinions, laws of evidence, laws limiting the fees of professional men and the charges of tavern keepers, laws regulating internal commerce, and laws which respect turnpike roads, ferries, &c., are recognized as undoubtedly within the sphere of State legislation. And it may be said that the power of legislative bodies to limit the rates of charges of unincorporated

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common carriers has never been judicially questioned. On the contrary this power has been recognized as a legislative power from time immemorial. (As applied to hackmen in the city of Boston, see *Commonwealth* v. *Duane*, 98 Mass., 1.)

On principle, the nature of the power to regulate rates of charges of common carriers is not changed by the mere circumstance that the carrier is a corporation instead of an unincorporated company. If it is a legislative power in the latter case, it must be the same in the former case. The legislature is the trustee of the public interests, and as far as they are concerned it is immaterial whether the carrier is a natural or an artificial person. "It would be absurd to suppose that the powers of government are greater over the rights of the being endowed by the Creator, than over the one spoke into existence by human laws." (*Bank of the Republic* v. *County of Hamilton*, 21 Ill., 58.)

(We are here discussing the character of the power to limit the rates of charges of common carriers. Under another head will be considered the question, whether the legislature can abdicate governmental power vested in it by the constitution of the State.)

In a note to the case of *P., W. & B. R. R. Co.* v. *Bower*, published in the March number, 1874, of the American Law Register, on page 188, Judge Redfield says: "The regulation of the charges, and of the mode of conducting the business of common carriers of passengers and freight, is surely one of *legislative* action more than most others; and especially since the construction of railways, whereby all regulation of prices, by way of competition, upon most routes, has been rendered impossible, thus making it a most overwhelming monopoly, extending to the most important and essential interests of the whole community."

In the *People* v. *Mayor, &c., of New York*, 32 Barb., 102, certain ferries or ferry rights were granted to the mayor, &c., of New York, by the colonial governors, Dongan, Cornbury and Montgomerie. The court, per Hogeboom, J., say: "I suppose, that under these charters the defendants have property rights in the markets, the city hall, the lots of ground and public lands, the docks and the *ferries* mentioned therein. They hold them

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as grantees, as owners, by contract, by a title equally strong and inviolable, I think, as do private individuals or corporations. * * * * In regard to *ferries*, I am of opinion that there is a still further right," (besides the right of eminent domain), "which the public may exercise, to-wit: *the right of regulating the rates of ferriage*, and of so controlling ferry franchises and privileges in the hands of grantees or lessees, that they shall not be abused, to the serious detriment or inconvenience of the public. It seems to me that the grantees of ferries, or ferry rights, must be deemed to accept them subject to these implied conditions. The people, represented by their king or their governor, as the case may be, own these rights, and hold them for the benefit of the mass of citizens of which the public is composed—and their representative, their king or their government, must so administer them, as that the rights of the public must be preserved. They can not be conveyed away or surrendered. The navigable waters belong to the people, the sovereign power; they are for the use and navigation of the subjects or constituents of the government;" (and so are railroads) "and they can not be transferred, even the usufructuary interest in them, so as to divest the government of that control over them, which is essential to protect and preserve the interests of the citizen. At least, I think the legal presumption is, that the grants of ferry rights are conferred and accepted with such qualifications. It is possible that a different question might arise if it was established that, as between the grantor and the grantee, a pecuniary or other valuable consideration was actually paid for the transfer or conveyance of a ferry right, not only present, but prospective. When such a state of facts presents itself, it will raise the question whether a government can for any consideration, or upon any pretence whatever, grant away or relieve itself from those rights and obligations which belong and are due to the constituent body, and are essential to their safety and well being. I am therefore of opinion that when these ferries or ferry rights were conveyed to the mayor, recorder, aldermen and commonalty of New York, by the colonial governors, Dongan, Cornbury and Montgomerie, they took the same subject to the governmental regulation and control, to which I have referred; that this right

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passed on the change of government from a colony to a State, to the supreme power of the State; and that it may be now manifested and exercised by the *legislature* acting for the people in their sovereign capacity. It is in strong confirmation of these views that both the colonial and the State legislatures, notwithstanding those apparently unqualified grants, have repeatedly enacted *laws regulating rates of ferriage* over these very waters, as well as over other tide waters, the right to establish ferries across which has been conferred by acts apparently unqualified in their terms. * * * * It may be said that the legislature, under pretence of regulating the right, might practically destroy it, by reducing rates of ferriage to a non-remunerative standard. This is possible. Like all other powers of a similar character—like the taxing power—it is susceptible of abuse. It is not to be presumed that the legislature will do injustice. If they prove recreant to their duty, the remedy consists in giving their places to others, and reforming the evil." pp. 112–115.

In *City of Oakland* v. *Carpentier*, 13 Cal. 540, the board of trustees had power "to lay out, make, open, widen, regulate, and keep in repair, all streets, bridges, ferries, public places, and grounds, wharfs, docks, &c., and to authorize the construction of the same." Under this clause the board, by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing, and regulating, wharfs, &c., within the city, for thirty-seven years. Held, that the ordinance was void. The court say: "The general power over the wharves and docks is like the general power over the streets and highways. The corporation must exercise the general powers which the term 'regulate' implies. This general power involves the determination of the questions whether a wharf shall be constructed, when, how, in what places, on what terms, how kept, *and what charge shall be exacted for the use?* These *police regulations* are essential to the interest of the city, its commerce, its health possibly, certainly its convenience and general prosperity. * * * * The reason is, that this power of regulation is a *political* power, and therefore, the transfer of it is the transfer of a power of municipal legislation; which authority is not in its nature alienable. It is not

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the transfer of so much property; it is the transfer of a power to create, and control, and regulate, a certain species of franchise, the creation, control, and regulation of which are *powers of the political department*," pp. 546, 547.

It is submitted, that the authorities establish beyond all controversy the principle that the legislature, by virtue of its being the representative and trustee of the sovereignty of the people, *has* the power to limit the rates of charges of unincorporated common carriers. This power, variously called political, police, and governmental, is in its nature and essential attributes, legislative power. The question immediately arises whether a legislative body can debar itself or its successor from the exercise of a power governmental or properly legislative in distinction from the mere power to transfer the title to lands or other property belonging to the State.

VIII.

POLITICAL OR GOVERNMENTAL POWER CONFERRED BY THE LEGISLATURE CAN NOT BECOME A VESTED RIGHT AS AGAINST THE GOVERNMENT IN ANY INDIVIDUAL OR CORPORATION.

On principle, it would seem to be a self-evident proposition, that a legislature can not barter away any part of the sovereign power of the State—"the power", as Chief Justice Taney says in the *License Cases*, 5 How., 583, "to *govern* men and things within the limits of its dominion." If a legislature could divest itself of any portion of its governmental power, it would thereby be enabled, in effect, to change the constitution of the State, not only without the consent of the people, but against the constitutional provision expressly declaring that, "The legislative power shall be *vested* in a general assembly." A charter containing provisions contrary to the constitution of the State must be void, precisely as any other legislative act.

In the case of the *People* v. *Morris*, 13 Wend., 331, the court, per Nelson, J., say: "It is an unsound and even absurd proposition, that political power, conferred by the legislature, can become a vested right as *against the government*, in any individual or body of men. It is repugnant to the genius of our institutions, and the spirit and meaning of the constitution; for

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by that fundamental law, all political rights not there defined, and taken out of the exercise of legislative discretion, were intended to be left subject to its regulation. If corporations can set up a vested right as against the government to the exercise of this species of power, because it has been conferred upon them by the bounty of the legislature, so may any and every officer under the government do the same." The italics are his own.

Afterwards, when Judge Nelson was a member of the Supreme Court of the United States, this opinion received the approval of that court in the case of *Butler* v. *Pennsylvania*, 10 How., 402. It was there unanimously held, that a law repealing a former act, and removing public officers, (canal commissioners), and changing the rate of compensation, did not impair the obligation of any contract within the meaning of the constitution of the United States. The court say: "The contracts designed to be protected by the 10th section of the first article of that instrument are *contracts by which perfect rights, certain definite, fixed private rights of property, are vested.* These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. * * * * * * The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exception of those of the governor, the judges of the supreme court, and the presidents of the several courts of common pleas. The salaries of these officers can not, under that constitution, be diminished during their continuance in office. Those of all other officers in the State, are dependent upon legislative discretion. We have already shown, that the appointment to and the tenure of an office created for *the public use*, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested, private personal rights thereby intended to be protected. *They are* functions *appropriate to that class of powers and obligations by*

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which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if, indeed, they can under any circumstances, be justified in surrendering them. This doctrine is in strictest accordance with the rulings of this court in many instances, from amongst which may be cited its reasoning in the important and leading case of *The Charles River Bridge* v. *The Warren Bridge*, in 11 Pet., 420, and in the case of *The State of Maryland* v. *The Baltimore & Ohio Railroad Company*, in 3 How., 534, *to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation.* In illustration of the doctrine here laid down, may also be cited the very elaborate opinion of the supreme Court of New York, in the case of *The People* v. *Morris*, reported in 13 Wend. 325." pp. 416–417.

It has been persistently claimed, within the last few years that under the decision in the case of the *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat., 518, governmental power (such as, according to all the authorities, is the power to control and supervise the rates of charges of unincorporated common carriers operating the public highways of the State,) may become a vested right as against the government in a corporation. But a re-examination of that case will show that the court expressly held that "if the act of incorporation be a grant of *political power*, if it create a *civil institution to be employed in the administration of the government*, * * * * the subject is one in which the legislature of the State may act according to its own judgment."

Chief Justice Marshall, in delivering the opinion of the court, says: "The points for consideration are, 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

"On the first point it has been argued, that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for state purposes, and to many of those laws concerning civil institutions, which must change with

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circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government; and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right of property. That anterior to the formation of the constitution, a course of legislation had prevailed in many if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

"*The general correctness of these observations can not be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted.* The provision of the constitution never has been un-

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derstood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. * * * * The parties in the case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. *If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government*, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, *the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.*" pp. 627–630.

In *West River Bridge Company* v. *Dix*, 6 How., 507, it was urged by counsel on behalf of the corporation, that the legislature, under the ruling of the Dartmouth College case, had granted to the corporation rights superior to the power of eminent domain. But it was held otherwise by the court, Wayne, J., alone dissenting. The court say: "No State, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it can not be justly disputed, that in every political sovereign community there *inheres necessarily* the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The constitution of the United

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States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the constitution; *and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self-preservation.*" pp. 531, 532.

In *East Hartford* v. *Hartford Bridge Co.*, 10 How., 511, it was argued by counsel, that a grant by the State of certain privileges to the town of East Hartford in relation to a ferry across the Connecticut river, was within the protection of the clause in the constitution of the United States, against impairing the obligation of contracts. But it was held otherwise, Woodbury, J., delivering the unanimous opinion of the court; and the following reasoning of the court is just as applicable to railroads as to ferries:

"Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

"It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it. See Taney, C. J., in 11 Pet. 547, 548.

"In *Goszler* v. *The Corporation of Georgetown*, 6 Wheat., 596–598, it was held that a city with some legislative power as to by-laws, streets, &c., could, after establishing a graduation for its streets, and after individuals had built in conformity to

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it, change materially its height. This case appears to settle the principle that *a legislative body can not part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require.* And though private interests may intervene, and then should not be injured except on terms allowed by the constitution; yet public interests in one place or corporation may be affected injuriously by laws, without any redress, as legislation on public matters looks to the whole and not a part, and may, for the benefit of the whole to the injury of a part, change what is held under it by public bodies for public purposes. *The legislature, therefore could not properly divest itself of such control,* nor devolve it on towns or counties, *nor cease from any cause to exercise it on all suitable occasions. Clark* v. *Corporation of Washington*, 12 Wheat., 54.

"Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others. *Presbyterian Church* v. *City of New York*, 5 Cowen, 542; *Fairtitle* v. *Gilbert*, 2 D. & E. 169.

"Nor can the public be estopped by such attempts, since the acts of their agents are to be for the public, and for its benefit, and not for themselves individually, and are under a limited authority or jurisdiction, so as to be void if exceeding it." pp. 534, 535.

In *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How., 416, it was held that the legislation of Ohio, respecting the taxation of the plaintiffs, did not amount to a contract, the obligation of which had been impaired. Chief Justice Taney, in delivering the leading opinion says on page 427: "In this case, the judgment of the supreme court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs." In the course of his opinion, on page 431, the Chief Justice says: "The powers of sovereignty confided to the legislative body of a State are *undoubtedly a trust* committed to

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them, to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They can not, therefore, by contract, deprive a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the State. And in every controversy on this subject, the question must depend on the constitution of the State, and the extent of the power thereby conferred on the legislative body."

In the same case, Catron, J., concurring with the majority in the opinion that the judgment of the State court should be affirmed, says on page 441: "I stated my views as to the character and effect of the sixtieth section of the act of 1845, in the case of *The Piqua Bank* v. *Knoop;* there I came to the conclusion that no restraint was intended to be imposed on a future legislature to impose different and additional taxes on the banks to which the act applies, if that was deemed necessary for the public welfare. My conclusion also was, in the above case, that if such restraint had been attempted, it was inoperative for want of authority in a legislature to vest in a corporation by contract, to be held as a franchise and as corporate property, a general political power of legislation, so that it could not be resumed and exercised by each future legislature. That a different doctrine would tend to sap and eventually might destroy the State constitutions and governments; *as every grant of the kind, to corporations or individuals, would expunge so much of the legislative power from the State constitution as the contract embraced.*"

In the same case, on page 443, Daniel, J., whilst concurring in the conclusion that the decision of the supreme court of Ohio should be sustained, added: "I never can believe in that, to my mind suicidal doctrine, which confers upon one legislature, the creatures and limited agents of the sovereign people, the power, by a breach of duty and by transcending the commission with

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which they are clothed, to bind forever and irrevocably their creator, for whose benefit and by whose authority alone they are delegated to act, to consequences however mischievous or destructive."

Campbell, J., also concurred in the conclusion that the judgment should be affirmed. His views, coinciding with Catron and Daniel, J. J., on the constitutional question are set forth at large in an elaborate opinion in the subsequent case of *Dodge* v. *Woolsey*, 18 How., 369–380.

It may be said, however, that the decisions of the Supreme Court of the United States, sustaining the validity of exemptions from taxation, are in conflict with the general proposition under consideration. They were certainly so regarded by the dissenting judges. Thus in *Washington University* v. *Rouse*, 8 Wall., 442, Miller, J., in his dissenting opinion concurred in by Chase, C. J., and Field, J., says: "But we must be permitted to say, that in deciding the first of these propositions, namely, the validity of the contract, this court has, in our judgment, been, at times, quick to discover a contract that it might be protected, *and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others.* This has been especially apparent in regard to contracts made by legislatures of States, and by those municipal bodies to whom, in a limited measure, some part of the legislative function has been confided. * * * * With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

In a note to an able article entitled, "The Dartmouth Col-

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lege Case," published in the January number, 1874, of the American Law Review, on page 207, will be found the following summary statement in regard to these tax cases:

"In *New Jersey* v. *Wilson*, 7 Cranch, 164, the State of New Jersey did not deny the validity of the agreement, but only contended that it did not follow the lands into the hands of the purchasers. In *Gordon* v. *Appeal Tax Court*, 3 How., 133, the doctrine was assumed by the court and not denied by counsel. In *State Bank of Ohio* v. *Knoop*, 16 How., 369, the question was first really adjudicated, Catron, Daniel, and Campbell, J. J., dissenting. In *Home of the Friendless and Washington University* v. *Rouse*, 8 Wallace, 430, 439, it was again affirmed, Chase, C. J., and Miller and Field, J. J., dissenting. In *Washington Railroad* v. *Reid*, 13 Wallace, 264, it was re-affirmed, being treated as *res adjudicata*."

It is a significant fact, however, that in *State Bank of Ohio* v. *Knoop*, 16 How., where the tax question was first really decided, the majority of the court protested that they were not justly chargeable with the doctrine that a legislature can alienate any of the sovereign powers of the State. McLean, J., speaking for the majority of the court in that case said: "But it is said the State can not barter away any part of its sovereignty. No one ever contended it could." p. 389. And in *Bloomer* v. *Stolley*, the same Judge on the Circuit, said: "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has a right to exercise the same discretion. Measures though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract." [Of course it would not assume the substance of a contract, if it attempted to barter away any part of the sovereignty of the State, which can not be made the subject matter of contract.] "If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the constitution, may modify or

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abolish the acts of its predecessor; whether it would be wise to do so, is a matter for legislative discretion." 5 McLean, 161.

With the explanation inserted in brackets, in accordance with the concession made in the principal tax case, above cited, the true doctrine is here stated and supported by sound reasoning.

In view of this protest by those upholding the doctrine of the tax cases, and upon the authority of the numerous decisions of the Supreme Court of the United States, including even the reasoning of Chief Justice Marshall, in the Dartmouth College Case, must we not arrive at the conclusion stated by Judge Cooley, in his treatise on Constitutional Limitations, as follows: "It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State could not barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which, in full vigor, is important to the well-being of organized society; and that any contracts to that end, *being without authority*, can not be enforced under the provision of the national constitution now under consideration." p. 283.

And since the publication of that work, Judge Cooley, in delivering the opinion of the supreme court of the State of Michigan, in *Gale* v. *Village of Kalamazoo*, 23 Mich., 354, (a market house case where a monopoly had been granted,) has said: "It will not do to say of such a contract, that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. What would be thought proper for the village this year might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must

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transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition."

So, the Supreme Court of the United States, at a comparatively recent date, 1870, in the Legal Tender Cases, per Strong, J., have said: "As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign; so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, *and no obligation of a contract can extend to the defeat of legitimate government authority.*" 12 Wall., 551.

And it would seem from this review of a long line of decisions made by the Supreme Court of the United States, that this is the only consistent and the real doctrine of that court. Political or governmental power conferred by the legislature can not become "a vested right *as against the government* in any individual or body of men."

IX.

EVERY AGENCY EMPLOYED BY THE LEGISLATURE IN ADMINISTERING GOVERNMENTAL AFFAIRS IS TO BE TREATED QUOAD HOC AS A CIVIL INSTITUTION, AND THEREFORE IS SUBJECT TO LEGISLATIVE CONTROL TO THE EXTENT OF SUCH EMPLOYMENT.

In *City of Patterson* v. *Society for Establishing Useful Manufactories*, 4 Zabriskie, 399, the court say: "In dealing with chartered rights, regard is always to be had rather to the *character* of the rights granted, than to the nature of the corporation. A municipal corporation exercising powers conferred not for public purposes, but for their private benefit and emolument, will be regarded *quoad hoc* as a private company. *And the converse of the principle is equally true.*"

In *Olcott* v. *Supervisors*, 16 Wall., 695, 696, as we have seen, the court say: "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of

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a private corporation. No matter who is the agent, the *function* performed is that of the State. Though the ownership is private, the *use* is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. * * * * It is the *purpose* and the *uses* of a work which determine its *character*."

That railroad corporations are not strictly private corporations, but are of a *quasi* public character, see also *Swan* v. *Williams*, 2 Mich., 427, 434; *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal., 543, 577; *Commissioners of Leavenworth Co.* v. *Miller*, 12 American Reports, 425, 449–457.

Even in the Dartmouth College Case, Chief Justice Marshal says: "The *character* of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the *objects* for which they are created. The right to change them is not founded on their being incorporated, but on their being the *instruments of government*, created for its purposes. *The same institutions created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature.* THE INCORPORATING ACT NEITHER GIVES NOR PREVENTS THIS CONTROL." 4 Wheat., 638.

It is readily seen from this extract how great has been the misrepresentation of what was really decided in the Dartmouth College Case. Judge Redfield, in the note previously cited from, (American Law Register, March No., 1874, pp. 187, 190,) in commenting upon the extended construction sought to be given by interested parties to the decision in this case, says:

"*We must say, in all soberness, that if the doctrine of the Dartmouth College case reached so far into the domain of state legislation as to exempt corporations from its control except when favorable to their wishes, which is no control at all, we should be prepared to say it never ought to have been made, and the sooner it is reversed the better. But there is, in our humble judgment, no fair pretense for giving it any such extension.* By common consent it is conceded that the New Hampshire legislature had in effect repealed the charter of Dartmouth College, and substituted a new college or university in its place, and these

separate institutions continued in operation until the decision was declared by the court. *We cannot suppose, from the doctrines contained in the opinion in that case, that there was any purpose of exempting existing corporations from the force of general legislation, to any greater extent than natural persons are exempted.*

"State legislatures have no power to transfer the property of one person, natural or corporate, to another or to deprive the owner of its beneficial use; and it is this principle which lies at the foundation of the decision in that case. The franchises of a corporation to act as such, and to pursue the business implied in its creation, are its property, as much as its goods and chattels, and it matters little whether the legislature repeal those franchises, or paralyze their use, by arbitrary and needless restrictions. It is against this kind of legislative interference that the decision in the Dartmouth College case is leveled. But there is nothing in that case, which upon any fair construction, can be understood as giving any greater immunity to corporations, from obeying general legislation in regard to their business, than natural persons have. That decision is addressed, mainly, to the point of declaring inviolate the vital or essential franchises and functions of existing corporations; thus placing them upon the same level as natural persons pursuing the same business under the same legislative guarantee.

"We can not disguise to ourselves, and have no wish to evade or suppress the admission of the existence of a very extensive public opinion, possibly to some extent among the profession, if not among judges, both State and national, without much reflection or examination, that the Dartmouth College case really does justify some such doctrine as that contained in the principal case. This view is somewhat purposely countenanced often, it is feared, by two classes of people: 1. Those who feel no respect for any doctrine of law whereby vested rights are held inviolate, and who consequently desire to bring all such rules of law, as far as practicable, into public disrespect and contempt, which, in a free country, largely governed by popular impulses and opinions, is in no way more successfully promoted than by pushing all such doctrines to the greatest extreme, so as to defeat

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their force and operation, as far as possible, by the *reductio ad absurdum*. 2. There are a very numerous and influential class of people, the controllers of vast amounts of capital, variously invested in associate and corporate stocks, who, in all good faith and soberness, use every means in their power to convince themselves and others that capital demands the inviolable protection of all the powers both of legislation and of judicial administration, and that to this end it is desirable to maintain the doctrine that corporations, when once chartered, are above the control of all legislation, except such as may be solicited by such corporations for their own advantage. But we trust we have shown that neither class obtain any countenance from the doctrines of the Dartmouth College case, when properly understood."

X.

A RAILROAD COMPANY BEING A COMMON CARRIER, EXERCISES A PUBLIC EMPLOYMENT, HOLDS AS IT WERE A PUBLIC OFFICE, AND THEREFORE IN RESPECT OF THE DUTIES OF A COMMON CARRIER IS SUBJECT TO GOVERNMENTAL CONTROL.

In the leading case of *Coggs* v. *Bernard*, Lord Holt said that the common carrier "exercises a public employment." 2 Ld. Raymond, 917.

So in *Lane* v. *Cotton*, Holt, C. J., said: "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." 12 Mod. 484.

In *Ansell* v. *Waterhouse*, where a common carrier was sued for not safely carrying a passenger, Holroyd, J., said: "This is an action against a person, who, by ancient law, held as it were a public office, and was bound to the public. Innkeepers were liable to indictment for extortion by ancient law, as well as action to refund." 2 Chitty, R. 4.

In *Hollister* v. *Nowlen*, the supreme court of New York say: "A common carrier exercises a public employment, and consequently has public duties to perform. He can not like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand." 19 Wend., 239.

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In *Sanford* v. *Railroad Co.*, the supreme court of Pennsylvania say, that "the company becomes a common carrier, and thus exercises a sort of public office." 24 Pa. St. 380.

In *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, the Supreme Court of the United States, say that the common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." 6 How., 382.

In *McDuffee* v. *P. & R. R. R.*, the supreme court of New Hampshire say: "A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office." 52 N. H., 430.

The argument is brief. Railroad companies are common carriers. (*C. & A. R. R. Co.* v. *Thompson*, 19 Ill., 578.) Common carriers, being a kind of public officers, are, as to their rates of charges, subject to legislative control. (*Commonwealth* v. *Duane*, 98 Mass., 1.) A legislature may refuse or neglect to exercise its governmental powers, but it "can not part with them by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require." (*East Hartford* v. *Hartford Bridge Co.*, 10 How., 535.) There is a material difference between the right of a legislature to grant the lands and other property of the State and the right to alienate the governmental powers vested in it and its successors as trustees by the constitution of the State. These do not seem to furnish the subject matter of a contract, and can not under a free government be dealt with as mere property. "They are," as Mr. Greenleaf says, "intrusted to the legislature to be exercised, not to be bartered away; and it is indispensible that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature, disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people." (Greenleaf's Cruise on Real Property, vol. II., p. 68, note.)

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XI.

THE LEGISLATURE OF A STATE HAS THE SAME RIGHT OF GENERAL LEGISLATION OVER CORPORATIONS WHICH IT HAS OVER NATURAL PERSONS.

In *Fletcher* v. *Peck*, 6 Cranch, 87, generally relied upon to show the power of a State to contract, the subject matter of the contract under consideration was a grant of land. But even in that case the court, per Marshall, C. J., say: "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects *general legislation*, can never be controverted." p. 135.

In *Nelson* v. *Vt. & Canada R. R. Co.*, 26 Vt., 717, it was held that the legislature may, by general laws, impose upon railroads new conditions, not contained in their charter, which are conducive to public interests. The court, per Redfield, C. J., say: "There can be no doubt, they have the same right of *general legislation* over these corporations, which they have over natural persons."

In *Branin* v. *Conn. & Pass. River R. R. Co.*, 31 Vt. 214, it was held that a statute making the corporation liable for the wages of laborers employed upon the construction of their road, by the contractors, was valid. The court, per Aldis, J., say: "The power of the legislature to pass all laws required by the public welfare, and to subject corporations like natural persons to their operations is unquestionable. This power is sometimes called the general *police* power of the State. The right and duty of the legislature to exercise it, and its extent and application, have recently been so fully considered and vindicated in the case of *Thorpe* v. *The Rutland and Burlington Railroad Company*, 27 Vt., 140, that it is needless to discuss the subject at this time. It is sufficient to say, that laws required by the public good are constitutional, though they may impose new obligations and restrictions, and may materially increase the expenses and diminish the profits of corporations. The object of such laws is the public welfare. Their effects upon the pecu-

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niary interests of corporations are merely incidental, and do not give character to them, or determine their validity." p. 222.

This case shows the scope of the police power. This power is not confined to the mere power to pass health laws. It is as comprehensive as the definition given to it by Chief Justice Taney in the License Cases:

"But what are the police powers of a State? They are," he says, "nothing more or less than the powers of government inherent in every sovereignty, to the extent of its dominions. And whether a State passes a quarantine law or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, *the power to govern men and things within the limits of its dominion*. It is by virtue of this power, that it legislates; and its authority to make *regulations of commerce* is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it can not be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade." 5 How., 583.

In *State* v. *Holmes*, 38 N. H., 225, it was held that a license to sell spirituous liquors, granted under an act of the legislature, gave no vested right, and was revoked and annulled by the repeal of the statute before the expiration of the time limited in the license. The court, per Perley, J., say: "If we could suppose that the legislature intended to surrender the control which the constitution entrusts to them, over a subject of such general public concern, by granting vested rights to individuals trammelling future legislation, their power to do so is more than doubtful. If binding contracts could be made, conferring a vested right to sell for one year, why not for two years, or any defi-

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nite length of time? There is a strong opinion on this question in *Butler* v. *Pennsylvania*, 10 How., 416." p. 228.

So in *Metropolitan Board of Excise* v. *Barrie*, 34 N.Y. 657, it was held that licenses to sell liquors are not contracts between the State and the licensee, giving the latter vested rights, protected on general principles, or by the constitution of the United States. The court, per Wright, J., say: "The right to legislate on a subject so deeply affecting the public welfare and security has not heretofore been questioned or denied; and it could not well be, for it would have been to deny the powers of government inherent in every sovereignty to the extent of its dominions. A State is not sovereign without the power to regulate *all its internal commerce* as well as police. The legislature exercises and wields these sovereign police powers, as it deems the public good to require. It is a bold assertion, at this day, that there is any thing in the State or United States constitutions conflicting with or setting bounds upon the legislative discretion or action in directing how, when and where a trade shall be conducted in articles intimately connected with the public morals, or public safety, *or public prosperity;* or, indeed, to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government. And this power of a State to control and regulate its internal commerce and police is, in fact, the only point involved in the cases under consideration. * * * * * * * * *
If the act of 1857, had declared that licenses under it should be irrevocable (which it does not, but by its very terms they are revocable), the legislatures of subsequent years would not have been bound by the declaration. The necessary powers of the legislature over all subjects of internal police being a part of the general grant of legislative power given by the consitution, can not be sold, given away or relinquished. Irrevocable grants of property and franchise may be made, *if they do not impair the supreme authority to make laws for the right government of the State;* but no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." pp. 666–668.

In *Phalen* v. *Virginia*, 8 How., 163, it was held, that al-

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though the legislature had authorized a turnpike company to raise money by a lottery, yet a subsequent act limiting the time for the exercise of such authority, was valid. The court, per Grier, say: "It has been often decided by this court, that the prohibition of the constitution now under consideration, by which state legislatures are restrained from passing any 'law impairing the obligation of contracts,' does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this, whether the deed be dated before or after the act. Acts of limitation also, giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts after a certain time, have received the sanction of this court. Such acts may be said to effect a complete divesture or transfer, of right, yet, as reasons of sound policy have led to their adoption, their validity can not be questioned." p. 168.

XII.

STATUTES PRESCRIBING WHAT SHALL BE RECEIVED ON THE TRIAL OF CASES AS PRIMA FACIE EVIDENCE, HAVE NEVER BEEN CONSIDERED AS BEING OF THAT CLASS OF LAWS WHICH IMPAIR THE OBLIGATIONS OF CONTRACTS.

In *Bank of Columbia* v. *Okely*, 4 Wheat., 235, it was held, that a special provision in a State bank charter, giving the corporation a summary process against its debtors, was no part of its corporate franchises, and might be repealed at the will of the legislature. The court say:

"In giving this opinion, we attach no importance to the idea of this being a chartered right in the bank. It is the remedy, and not the right; and, as such, we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable, so as to bind subsequent legislatures. This subject came under consideration in the case of Young and the Bank of Alexandria, 4 C., 384, and it was so decided." pp. 244, 245.

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It is worthy of notice that this is the language of the same court that decided the Dartmouth College case. The two decisions were made at the same term of the Supreme Court of the United States, and consequently while that court was composed of the same justices.

Again, in *Ogden* v. *Saunders*, 12 Wheat., 349, Chief Justice Marshall, after considering statutes of frauds, of limitations, and against usury, says: "All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligations of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it is regulating the remedy and mode of proceedings in its courts."

In *Hand* v. *Ballou*, 12 N. Y., 543, the court say: "The legislature certainly have power to determine, by law, what shall in civil cases be received by the courts as presumptive evidence."

In *Commonwealth* v. *Williams*, 6 Gray, 1, it was held, that a statute providing that in prosecutions for common selling of spirituous and intoxicating liquors, delivery in or from any building or place, other than a dwelling house, "shall be deemed *prima facie* evidence of a sale," was valid. The court say: "It is no new thing in the history or administration of the law, that peculiar and artificial force is given or attributed to particular facts, or series of facts, as means and instruments of legal proof. This may be seen in many of the rules of evidence which prevail by the common law, and in others which derive their force from legislative acts. These, then, are conclusive presumptions; which from motives of public policy, or for the sake of greater certainty, or for the promotion of the peace and quiet of the community, have been adopted by common consent. Sometimes the common consent by which this class of presumptions is established, is declared through the medium of the judicial tribunals, and thus becomes a part of the common law of the land. And sometimes it is expressly declared by the direct authority of the legislature in statutes duly enacted."

In *Allen* v. *Armstrong*, 16 Iowa, 513, the court, per Dillon,

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J., say: "that the legislature is competent to declare that the tax deed shall be presumptive or *prima facie* evidence of the regularity and validity of all prior proceedings, is everywhere admitted."

In *Pillow* v. *Roberts*, 13 How., 476, the court, per Grier, J., say: "The power of the legislature to make the deed of a public officer *prima facie* evidence of the regularity of the previous proceedings can not be doubted."

In this State, the statute of 1829, for the collection of revenue declared that a "deed from the Auditor of Public Accounts, shall be evidence of the regularity and legality of the sale until the contrary shall be made to appear." It was repeatedly held, that this statute dispensed with the rule of the common law which required a party claiming title under special proceedings authorized by statute, by which the estate of one man may be divested and transferred to another, to prove that all the material requisitions of the statute have been complied with, and placed the burden of proof, in the first instance, on the party controverting the title claimed under the Auditor's deed." (*Graves* v. *Bruen*, 11 Ill., 431, and cases cited.)

Judge Cooley, in his work on Constitutional Limitations, gives the following summary of the law on this subject: "It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation, they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire, that a statute

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which removed the disqualification of interest, and allowed parties to suits to testify, might lawfully apply to existing causes of action. So may a statute which modifies the common law rule excluding parol evidence to vary the terms of the written contract; and a statute making the protest of a promissory note evidence of the facts therein stated. These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice." (p. 367, and cases there cited.)

Without further citation of authorities, and relying on the soundness and force of the reasoning of the various jurists, whose opinions have been adduced in support of our several propositions, we arrive at what would seem to be a necessary conclusion resulting from the validity of these propositions, namely: That the State of Illinois was in the exercise of its legitimate powers when it prescribed what should be received by the courts as *prima facie* evidence of unjust discriminations, and of reasonable maximum rates of charges for the transportation of passengers and freights on the railroads in the State.

R. M. BENJAMIN.

WE commend to the profession throughout the country, the article in this number entitled, "The Railroad Legislation of Illinois," as probably the most careful and best prepared collation of the authorities upon the various questions discussed, that has ever been published. The writer, the Hon. R. M. Benjamin, has given much thought to these questions, and has thereby been enabled to present them in a logical manner, and to simplify the many apparent complicated questions involved in the railroad legislation of the country. We expect further articles from the same writer upon other subjects.

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EFFECT OF ASSIGNMENT OF REVERSION.

It is a well established rule of the common law that the grantee of a reversion on a lease can not enforce the covenants of the lessee for the payment of rent. The leading case on this point is *Webb* v. *Russell*, 3 Term Rep. 401. See also *Barker* v. *Damar*, 3 Mod., 336; S. C. Carth., 182; 1 Salk., 80; *Barker* v. *Dormer*, 1 Show., 191; *Thrale* v. *Cornwall*, 1 Wis., 165; *Isherwood* v. *Oldknow*, 3 Mau. & Selw. 394.

When the act providing for the dissolution of the Monasteries, 31 Henry 8, c. 13, was enacted, King Henry the Eighth obtained large accessions of landed property, much of which became vested in the subject by purchase, or the liberality of the crown. The fact that a very considerable portion of this landed property was at the time of such dissolution held and possessed by lessees, caused the adding to said act the second section to meet the difficulty of the above mentioned rule of the common law; which section 2, provided that the king should have, hold, possess and enjoy, to *him and his heirs and successors* forever, such late Abbotries, Monasteries, &c., and all the sites, circuits, precincts, manors, lordships, &c., rights, interests, tithes, conditions, &c., appertaining thereto, in as ample a manner as the late abbotts, priors, &c.

But as this act of 31 Henry 8, failed to provide for conferring the same benefits upon the king's *grantees*, the following year, to supply this defect the act of 32 Henry 8, c. 13, was passed, and this act conferred the same benefits upon the king's grantees.

It is upon this act of 32 Henry 8, that sections 14 and 15 of the Landlord and Tenant act of Illinois, is founded. See (Monthly Western Jurist, vol. 1, page 49.) And we are left in Illinois just as this act left the titles in England. Under the act of 32 Henry 8, "it has been a rule of universal application, that to bring the grantee within the operation of the act, he must *have taken the very reversion under which the relation of lessor and lessee subsisted.* And therefore if the lessee for years underlet, and the reversioner paramount purchased the mesne reversion of the first lessee, or if the first lessee purchased the immediate reversion paramount, in neither case could the purchaser maintain an action for the rent of the under lessee, the reversion to which the rent was incident being destroyed by its union with the reversion paramount." See *Le Seignor Thre'r* v. *Barton*, Mo. 94; *Burleigh* v. *Brays*, cited in 2 Roll., 245; *Chaworth* v. *Phillips*, Moor. 8, 76; *Blackstone* v. *Heap*, Godb., 279; *Webb* v.

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Russell, 3 Term Rep., 393; *Stokes* v. *Russell*, 3 Term Rep., 678; *S. C.*, 1 Hen. Blac., 562; *Burton* v. *Barclay*, 7 Bing., 745; *S. C.* 5 Mo. & Pa., 785; *Wooltey* v. *Gregory*, 2 Yo. & Jerv., 536; *Thorn* v. *Woollcombe*, 3 Barn & Add. 586.

For example, if A, the owner in fee, should lease to B, for a term of years, and B. should lease the same premises to C, and B should then purchase the fee of A, B's leasehold title would become merged in the fee simple title, and under the foregoing rule B could not maintain an action for the rent against C.

It was to remedy this evident hardship that the statute of 7 & 8 Victoria, c. 76, § 12, was enacted. When again it was found that further legislation was required, the act of 7 & 8 Vic., while providing for the case last above mentioned, failed to protect the rights of the under lessee, there being no provision for preserving the under lessee's rights against the reversioner in whose estate the mesne reversion might merge; nor did it extend to the case of a superior reversion which absorbed that immediately expectant on the lease being itself merged in a reversion paramount. Hence the statute of 8 & 9 Vict., c. 106, was enacted to remedy these defects; 8 & 9 Vict., c. 106 provided, that when the reversion expectant on a lease, made either before or after the passage of it, if any tenements or hereditaments of any tenure shall after the 1st October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

The bill for "An act to simplify the transfer of property," introduced by me in the Illinois senate, on the 11th of January, is as near as can be, a copy of the above section of the statute of 8 & 9 Vict., c. 106. That the subject is one of great difficulty to properly provide for, is evidenced by the fact that so many English statutes were enacted before the desired result was obtained. Besides those above named, the statutes of 4 Geo. 2, c. 28, and 39 & 40 Geo. 3, c. 41, § 10, may be referred to as bearing upon the same subject though of limited operation.

John Borden, Esq., of Chicago, first called my attention to the fact that we had no statute in Illinois securing the benefits provided for by the statute of 8 & 9 Vict. above mentioned.

Very respectfully, R. S. THOMPSON.

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EXECUTION—WAIVER OF EXEMPTION BY CONTRACT.

The statutes of the several States provide that certain property (naming it) of private individuals shall be and remain exempt from forced levy and sale. And if the debtor is the head of a family, there is usually still further exemption provided for. The justice, wisdom, and sound policy of exemption laws are as well recognized, and these laws are as fully the settled policy of the States, as the exemption from imprisonment for debt. In the case of *Curtis* v. *O'Brien & Sears*, 20 Iowa, 376, the supreme court of that State held, that a waiver of exemption laws contained in a note, will not when a judgment is obtained on such note, entitle the plaintiff to have his execution levied upon property exempt from execution by the general law of the State. The court, per Cole, J., say: "That the citizen or debtor may mortgage the identical property for the payment of the debt, does not at all conflict with the idea that he cannot waive the exemption of the statute in his contract of indebtment, because the statute itself has provided for the execution of valid mortgages, without limit as to the property mortgaged. In the case of a judgment creditor applying to the court or its officer for an execution, the court, by its clerk, following the language of the law, says to him, 'You may have the execution, but no

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exempt property shall be sold under it;' the creditor, however, says to the court, 'I will take your execution, but the debtor and myself have made a law for this case, which will control your writ and make it do what the law has declared it shall not do.' No court will permit parties thus to control its process so as to defeat the statute, or render nugatory its most beneficent provisions. Without pursuing the discussion of the subject further, in the opinion we are agreed in the conclusion that a person contracting a debt, can not by a cotemporaneous and simple waiver of the benefit of the exemption laws, entitle the creditor in case of failure to pay, to levy his execution against defendant's objection upon exempt property. Such an agreement is contrary to public policy, and will not be enforced."

This question arose in a recent case in Kentucky, *Moxley* v. *Ragun et al.*, reported in the American Law Register, for Dec., 1874, p. 743, where the same doctrine was held. The court, per Prior, J., say: "There is an essential difference, however, between an executed contract, by which the owner is divested of title, and an executory agreement, by which the debtor merely promises that in the future he will not take advantage of or claim the benefits of a particular statute.

Executory agreements are generally enforced, and as much obligatory on parties as if in fact executed, but there are exceptions to this general rule. No one in this State is entitled to the benefit of the exemption laws but a housekeeper with a family; and the legislature certainly intended by the enactment of such laws, to provide more for the dependant family of the debtor, than the debtor himself. Every honest man has a desire to fulfil all his obligations, and such are always willing to comply with the demands of a creditor, by giving to the latter any assurance he may exact as an evidence of his intention to pay his debt. The law in its wisdom for the poor and needy, has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts as reduce the family to want.

Such is the policy of the law, and this contract was made not only in disregard of this policy, but to annul the law itself, so far as it affected the debt sought to be recovered. If such a

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contract is upheld, the exemption laws of the State would be a blank upon the statute book, and deprive the destitute of all claims they have to its benificent provisions. Suppose one should agree with his creditor that he would never take the benefit of the bankrupt law, or that if he failed to pay a debt due on a certain day, that his land should be forfeited and never after subject to redemption, can it be pretended that such contracts could be enforced. The stipulations contained in the note, vested the appellee with neither the right to the property nor the right to the possession of it. Nor can its recitals work any estoppel, as the one party knew, or is presumed to have known as much of the law with reference to such a contract as the other. The agreement to waive this right is illegal and void. As said by Denio, J., in the case of *Kneettle* v. *Newcomb & Brown*, "the law does not permit its process to be used to accomplish ends which its policy forbids, though the parties may by a prospective contract agree to such use." 31 Barbour, 170, 9 Howard, 547. The case of *Kneettle* v. *Newcomb & Brown*, 31 Barb., was subsequently reviewed by the court of appeals, and is reported in 22 New York, 249, and the judgment of the supreme court was affirmed, and the court further held, that independently of this particular policy that it is not within the power of parties to give by their contract any other effect to judgments and executions, than that which is given by law. The court, on page 252, per Denio, J., say: "The contract, if held valid, would change the effect of the legal instrumentalities which the law has provided for the collection of debts. Executions upon judgments for debts, authorize the seizing of all the debtor's property except the articles specially exempted. These the officer is forbidden to take unless the debt was contracted in the purchase of property which was itself exempt from execution. (Laws 1842, ch. 157.) I do not think it is within the power of parties by their contracts to give any other effect to judgments and executions than that which the law attributes to them. Could a person when contracting a debt, agree for instance, that the law abolishing imprisonment for debt should not apply to any judgment which should be recovered on that contract; or that on such judgment there should be no right in the debtor to redeem

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any lands that might be sold under any execution, or that he should not be discharged under any insolvent act. Clearly this could not be done, and upon the same principle I think the debtor could not when contracting the debt, agree that exempt property might be taken on the execution."

This question has been decided differently in the different States. In Pennsylvania, it is held, that the exemption is a privilege which the debtor may waive by contract, and will be enforced. *M'Kinney* v. *Reader*, 6 Watt., 34; *Case* v. *Dunmore*, 23 Penn. St., 93; *Lauck's Appeal*, 24 Penn. St., 426; *Johnston and Sutton's Appeal*, 1 Casey, 116; *Line's Appeal*, 2 *Grant's Cases*, 197; *Smith's Appeal*, 23 Penn. St., 310; *Bowman* v. *Smiley*, 31 Penn. St., 225; *Huling* v. *Drexell*, 7 Watt. 126; *Shelly's Appeal*, 36 Penn. St., 373.

That such waiver is ineffectual, and will not be enforced, see *Curtis* v. *O'Brien & Sears*, *supra; Kneettle* v. *Newcomb & Brown*, 22 N. Y., 249; *Crawford* v. *Lockwood*, 9 How. Pr. R., 547; *Harper* v. *Leal*, 10 Id., 282; *Levicks, Barret & Kuen* v. *Walker*, 9 A. M. Law R., (1860, 1861,) 112; *S. C.* 15 La. An. 245; *Shoenberger* v. *Watts* 10 Id., (1861, 1862,) 553; *Troutman* v. *Gowing*, 16 Iowa, 415; *Warnibold* v. *Schlicting*, 16 Iowa, 243; *Maxwell* v. *Reed*, 7 Wis., 582. See also, *Woodward* v. *Murray*, 18 Johnson, 400; *Moxley* v. *Ragun*, *supra*. Upon a full review of the authorities it would appear that a party can not by contract waive the benefit of the exemption laws to the extent of authorizing a levy upon exempted property, issued upon a judgment rendered upon such contract, except in the State of Pennsylvania. The statutes of several of the States provide for the waiver of the homestead exemption, and to these several statutes the reader is referred. As in Illinois, the statute after providing for the exemption of the homestead, provides that "no release, waiver or conveyance of the estate so exempted shall be valid, unless the same is in writing, subscribed by said householder, and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance, or if the exemption is continued to a child or children without the order of the court directing a release thereof." Hurd's Stat., p. 497, § 4.

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Mayor's Court of Scranton, Pennsylvania.

COMMONWEALTH ex. rel. IDA POTTER v. WM. POTTER.

1. When a *habeas corpus* is directed to a private person to bring up the body of an infant, the court is not bound to deliver the infant into the custody of any particular person.

2. The court, in its discretion, may do so when the infant is too young to decide for itself.

3. Never ought divorces to be easily obtained.

4. Only such facts as would be cause for a divorce warrant a husband or wife in separating from the other.

5. The rule governing ecclesiastical courts, with regard to cruelty, is adopted by American courts.

6. Courts should not interfere in domestic quarrels, unless there be something to make cohabitation unsafe.

7. A husband may be justified in forbidding his wife any further intercourse with her friends.

8. A slight assault or battery in anger, in ordinary cases, does not justify a wife in separating from her husband. The attending circumstances should be considered.

9. Violence provoked by the wife, if not excessive, is no cause for separation.

10. A father is entitled by law to the custody of his legitimate infant, if he has the means and fitness for the trust. If he abuse the trust the court will protect the child.

11. A mother wrongfully living apart from her husband has no legal right against the husband to the custody of their legitimate infant.

12. Such infant has a legal right to nurture from its parents, which they are bound to observe.

13. This right is superior to the father's right of custody when their rights conflict.

14. When the interests of the child would be promoted by the mother's nurture, it should be placed in her custody.

15. When the father's means and fitness for the child's nurture are better than or are equal to the mother's, the child's interest and the father's legal right make the latter the custodian of the child.

16. In deciding as to the custody of children courts are guided by the child's interest.

17. The house of a third person, such person being addicted to the habitual use of profane language and intoxicating liquors to excess, is not the proper place for rearing a male child.

Opinion by

WARD, Recorder.—A *habeas corpus* issued, directed to William Potter, to bring up the body of Howard Potter, an infant

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child of the relatrix and respondent, aged about twenty months. The affidavits and other evidence show that in July, 1871, the respondent and relatrix were intermarried, and this child is the fruit of that union. Soon after their marriage they began housekeeping at Moscow, in this county, and continued thereat until November, 1873, during which period the respondent purchased a house and lot at that place, which he now owns. In consequence of stringent times he was obliged to close up his business at Moscow and seek employment in another field, which he found at Dunmore, this county, to which place he, with his wife and child, removed. During their residence at Moscow they lived happily. In the short time of their domicile at Dunmore infelicities occurred, and each occasionally treated the other indiscreetly and unkindly. Both at times were irritated, and omitted the amenities and courtesies that were due from one to the other. In moments of excitement they applied coarse and profane epithets to each other. While they were residing at Dunmore, one Stephen Allen, husband of Mrs. Potter's aunt, made several unchaste overtures to Mrs. Potter, which she properly communicated to her husband, and which naturally incensed him. Thereupon, he justly forbade her any further social intercourse with Allen. This she resented, and obstinately persisted in what she termed "no impropriety," her social intercourse with Allen, which seems to have led to all their trouble. The husband became morbid on the subject, entertained unfounded suspicions, which he now and then vented in inuendoes. There is not a *scintilla* of evidence impugning the wife's chastity, yet, she (no doubt mistakenly) did commit an "impropriety" in not absolutely abstaining from Allen's society. He who assails a woman's virtue is her direst foe. The woman, relying on her power of resistance, and parlying with her would-be seducer, is in imminent peril. In nine such cases out of ten her ruin is but a question of time. When a man offers such indignity to a virtuous woman she should instantly resent the affront, and with scathing rebuke drive the offender from her, and ever after shun him as she would a loathsome thing. If Mrs. Potter had acceded to her husband's wishes in this respect, she would have been saved much mortification. About three months after the

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respondent had removed his family to Dunmore, the term for which he had rented the house in which he lived expired, and he was compelled to leave it. He rented another in the same neighborhood, removed his household goods into it, but as it needed repairing he and his wife thought it best for her and the child to go to her father's house and remain through the coming summer; he took them to her father's house a few miles from Dunmore, and when there he and his wife made arrangements with her mother for the wife and child to remain there from that time through the coming summer, the wife to work for her own and the child's board, that the husband's wages might be applied to the payment of a debt he was owing. A short time after the wife's mother went to Bloomsburg, in an adjoining county, and made an arrangement with her brother-in-law for Mrs. Potter to clerk in his store for one dollar per week and music lessons. This was without the knowledge of the respondent. Upon her mother's return Mrs. Potter, without consulting her husband, left the child in her mother's care and started enroute for Bloomsburg to carry out the arrangement her mother had made for her. On her way, at Dunmore, she met Mr. Potter (remained over night with him, occupying the same bed), and told him of her destination and purpose, to which he strongly objected, told her the house was ready, and requested her to remain with him and go to housekeeping again. She refused to comply with his wishes, went to Bloomsburg, remained two months, during which he wrote her a foolish and unkind letter. In her absence he often visited his child. Upon her return from Bloomsburg to her father's house her husband sought, her, and earnestly solicited her to return to him, and "to remain his wife," (as they both express it), and go to housekeeping with him. This she positively refused to do, and "declared that she would no longer remain his wife." In that she still persists. A short time after the respondent took the child into his actual custody, and retained it until the hearing of this case. In this proceeding we are asked to transfer the child from the father's custody to the mother's. Have we such power? In a proceeding of this nature courts are not bound to deliver infants into the custody of any particular person, but may decide into whose custody an in-

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fant of tender years shall be delivered, when the circumstances of the case demand it. It is not of course, but of grace, resting in the discretion of the court. "The courts are bound *ex debito justitiæ* to set the infant free from improper restraint. But are not bound to deliver it over to any particular person. This must be left to the discretion of the court:" *Matter of Worden*, 13 John., 420; *People* v. *Chegary*, 18 Wend., 637; *People* v. *Mesciers*, 8 Paige, 47; *Rex* v. *Delaval*, 3 Burr., 1434; *Com.* v. *Addicks*, 5 Binn., 521. Having the undoubted power to award the custody of this infant to some one, we feel it to be our duty to exercise our power. Who, then, shall be the child's custodian? In a confined technical sense marriage is only a simple contract. When we give the subject an enlarged view it grandly rises to a higher grade than all ordinary commercial contracts. It is a solemn compact, dictated by nature, and instituted by Providence for purposes of civilization. It constitutes not only the relation of husband and wife, but causes that of parent and child, from which flows the law of descent and inheritance. It creates other relations of the highest possible interests. It is the foundation of social order, perpetuating society and nations, and is of more importance than all other contracts combined. Unlike ordinary commercial contracts, it is *sui generis*, and, being *publici juris*, is not dissoluble at the will of the parties: *Stevens* v. *Gray*, 17 Ben. Monroe's Rep., 210. In this country the legislative branch of the government cannot dissolve marriage without the fault of one of the parties and the assent of the injured party: *Dartmouth College* v. *Woodward*, 4 Whea., 518. In civilized countries husband and wife cannot effect a divorce by collusion or agreement. In this State, such an attempt would frustrate their purpose, notwithstanding the existence of a legal cause. The law thus jealously and rigorously guards the marriage contract. We are led to these remarks by the passage in Mrs. Potter's testimony, "he wrote me he would give me a divorce." In *Richards* v. *Richards*, 1 Wright, 228, Chief Justice Lowrie says: "Never ought divorces to be easily obtained, for marriage is the most sacred of human relations, and should never be dissolved without proof of imperious reasons. We may do wrong to the parties and their children, and to the public, when

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we aid one party in severing the relations without a clear necessity." If these sound principles of law were better understood there would be a great diminution of separations with the view to divorce. The first inquiry arising is, what will justify a husband or wife in separating from the other? We unhesitatingly say nothing, except such facts and causes as would entitle the withdrawing party to a divorce *a vinculo matrimonii: Holms* v. *Holms*, 2 Lev. 116; *Oliver* v. *Oliver*, 1 Haggard Consistory Rep. 361. In *Richards* v. *Richards*, above cited, Chief Justice Lowrie says: "Nothing short of such facts will justify a wilful separation or a continuance of it. The interests of society, the happiness of the parties, and the welfare of families, demand such a rule. Separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as ground for dissolutions of the marriage bond." We will next consider the species of cruelty the law recognizes as sufficient cause for separations. The same principles that rule the ecclesiastical courts with regard to cruelty are adopted by the American courts: *Barrier* v. *Barrier*, 4 John. Ch., 189; *Perry* v. *Perry*, 2 Page, 250; *Shaw* v. *Shaw*, 17 Conn., 189; *Finley* v. *Finley*, 9 Dana; *Worden* v. *Worden*, 3 Mass. 321; *Grove's Appeal*, 1 Wr., 447. "It is not the habit of courts to interfere in mere domestic quarrels; to warrant it there must be something that makes cohabitation unsafe." 1 Phillimore, 111. The definition of legal cruelty is, that which endangers life or the health of the party: 2 Phillimore, 132. "A husband forbidding a wife any further intercourse with her friends, although it might be a harsh exercise of the husband's authority, yet he might be justified in denying her such intercourse; though a woman may be amiable, her connections may not be so; there may be good reasons for a husband denying her such intercourse." 2 Phillimore, 132. Applying this latter principle to the case before us, we are satisfied that Potter had ample reason for denying his wife any further social intercourse with Allen. She ought to have heeded her husband's command. Certainly, it was just and reasonable. Chancellor Kent, in speaking of the degree of cruelty that entitles a wife to a separation, says: "The slightest tough or assault in anger would not, in ordinary cases, justify such a grave and

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momentous decision." Pothier says, (Traite du Contracts de Marriage, § 509), that a blow or stroke of the hand would not be a cause of separation under all circumstances, unless it was often repeated. The judge, he says, ought to consider if it was for no cause, or for a trivial one, that the husband was led to this excess, or if it was the result of provoking language on the part of the wife, pushing his patience to extremity. He ought also to consider whether the violence was a solitary instance, and the parties had previously lived in harmony. All these different circumstances will, no doubt have their due weight in regulating and directing the judgment of the court. *Barrier* v. *Barrier*, 4 John. Ch., 187. In *Richards* v. *Richards*, Chief Justice Lowrie says: "It is not of a single act that the law speaks, but of such a course of conduct or continued treatment as renders a wife's condition intolerable. Indignities provoked by the complaining party are, of course, no ground of divorce, unless the retaliation is excessive." We think Mrs. Potter's indiscretion and harsh words provoked her husband's jealousy, irritated his temper, and led him to the harsh words he addressed to her. These difficultles seem to have been trivial, and are equaled by those of many families whose good sense hides them from the world and intimate friends. The wife had no reasonable cause for separation, and in refusing to live with her husband committed a grave error. He, too, erred grievously in addressing his wife with profane and harsh language. Their bickerings have been childlike. The mutual observance by them of ordinary courtesy, moderation, and forbearance toward each other would have prevented their troubles. Evidently, the husband has a strong affection for his wife and child, sees the folly of his past course in some respects, is now anxious to make amends by resuming their marital relations, and discharging his duties in the spirit of love and kindness. All that is needed to effect a reconciliation with them is for the wife to reciprocate the husband's spirit of love, kindness and forgiveness. We trust her good sense and better feelings will in time prompt her to it. Their mutual happiness, the child's interests and social order demand it. Who is entitled to the custody of this child? In *King* v. *Demaniville*, 5 East., 223, a *habeas corpus* was directed to a

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father to bring up the body of an infant eight months old. In rendering judgment, Lord Ellenborough, C. J., said: "We draw no inference to the disadvantage of the father. But he is the person entitled by law to the custody of the child. If he abuse that right to the detriment of the child, the court will protect the child. But there is no pretence that the child has been injured for the want of nurture, or in any other respect. Then, he having the legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him." The same case afterwards came before Lord Eldon, who refused the mother the custody of the child, for the reason that she had withdrawn herself from the protection of her husband: 10 Vesey, 51. In *Exparte* Skinner, the court refused to take an infant six years old from the father and deliver it to the mother: J. B. Moore, 278. In the famous case of *Willesly* v. *The Duke of Beaufort*, 2 Russel, 9, Lord Eldon concedes that "the law makes the father the guardian of his infant children by nature and by nurture," and places the right of the court to interfere only upon the *abuse* of the trust or the *special* interest of the child. In *People* v. *Nickerson*, 19 Wend., 16, the mother had withdrawn herself from her husband without a reasonable cause, and taken with her an infant child, and was residing with her father. To obtain the custody of the child its father sued out a *habeas corpus*. In rendering the opinion of the court Chief Justice Nelson, said: "The father is the natural guardian of his infant children, and in the absence of good and sufficient reason shown to the court, such as ill-usage, grossly immoral principles or habits, want of ability, &c., is entitled to their custody, care and education. All the authorities concur in this point. The interference of the court with the relations of father and child, by withdrawing the latter from the natural affections, kindness and obligations of the former, is a delicate and strong measure, and the power should never be exerted except for the most sound and solid reasons. The hopes of the child in respect to its education and future advancement is mainly dependant upon the father; for these he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this

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relation would not only tend to wither these motives to action, but necessarily, in time, alienate the father's natural affection; and if property should be accumulated, the child, under such circumstances, could hardly expect to inherit it. In view of the foregoing rights of the father and duty of the court, I have diligently and carefully examined the facts disclosed in the affidavits, and feel myself bound to say that, upon the whole, nothing appears to justify the conclusions that the father is not a fit and proper person to have the care and education of his child, or that it would be for the interest of the child pecuniarily or otherwise to commit its custody to the mother. According to the principles of the common law and the numerous adjudicated cases already referred to, I must say that, unless the case can be materially varied, Mrs. Nickerson has greatly mistaken the obligations and duties that devolve on her by the marriage vow, and is now living in a state unauthorized by the law of the land." The forcible words of that eminent chief justice are eminently proper in the case before us. The two cases are so similar in all their features that the principles governing the one, control the other. In *Fitler* v. *Fitler*, 2 Phil., 348, Woodward, J., says: "Co-relative to the father's duty of maintenance is his right to the custody of his children. * * He has a right to direct their education and to enjoy their society. A divorce from their mother changes neither his duties nor his rights. He still bears the same relation to his children, * * and is still entitled to their custody, society and services. We do, indeed, administer this right of custody with a careful regard to the age and condition of the infant, and to the character and circumstances of the respective parties, but the general rule is, that the father is entitled to the custody of the children, and it is usually enforced, unless adequate cause be shown against it." From the above cited authorities we deduce the true rules, that a father has the legal and equitable right to his legitimate infant child, unless he has or is about to abuse the trust; or from grossly immoral habits or principles, he is unfit for the trust; or that the infant's interests demand that it should be transferred to the custody of another person. That a mother has no legal right to the custody of a legitimate infant against the father's right when she is

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wrongfully living apart from her husband. Such child has a legal and equitable right of nurture from the father and mother, which they are bound to observe in the way most conducive to the child's welfare, which is best done by the maintenance of unsevered family relations, and keeping the hearthstone unbroken and warm with conjugal, fraternal and maternal affection. When the parents separate, the infant's right to proper nurture is superior to the father's right of custody when they come in conflict. Therefore, when the infant's interests would be better served by the mother's nurture than by the father's, the law awards the child to her custody. Yet, when, from all the circumstances, it is apparent that the father's means, facilities, opportunity and fitness for the child's nurture are better than or equal to the mother's, the interests of the child and the legal rights of the father demand that he should be the custodian of his child. From a careful and elaborate consideration of the evidence, we find that the father is an industrious, temperate man, of fitness, with sufficient means, facilities and opportunity for the maintenance and nurture of his child; that he has not abused the trust, and that the child has not and is not likely to suffer for nurture while in his hands; that he is anxious to have his wife and child with him, and to discharge toward them his full duty; that he is, and always has been, a man of irreproachable character, (excepting these domestic difficulties, and the habit of using profane language); that for nearly three months he has wholly abstained from that reprehensible habit, and is now free from it. We also find that the mother is, without reasonable cause, living separate and apart from her husband, refusing him his conjugal rights; that she has no means of maintaining herself and child, but that her father, John Dings, offers a home to her and her child; that the said Dings habitually uses profane language and intoxicating liquors; also, that he has a minor son residing with him who habitually uses profane language. We do not consider Mr. Dings' house a proper place for rearing this little boy. The habits referred to of Dings and his son, we think, would have a pernicious influence on the child's mind, which, in after years, might taint his character and mar his usefulness. Children are creatures of imitation, and apt to

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grow according to their surroundings. They more readily learn the things they ought not than those they should. They always should be surrounded with moral influences, that their growth of character may be unto usefulness and honor, and not unto vice and shame. In disposing of the custody of this child, we are guarded by his interests. We feel the weight of the responsibility, and have paused long and earnestly in our deliberations. To take the child from the repentant husband (who is anxious to make amends for the past), and place the little one in the custody of the unpenitent wife, would be an unjust punishment and discouragement to the husband, and an improper encouragement to the wife in wrong-doing. We see no reason for the wife's refusal to return to her conjugal duties. The father must at all reasonable times and places, permit the mother to have access to the child, and to remain with it at her pleasure. We are satisfied that the interests of the child demand that it should be in the father's custody. Therefore, the child, Howard Potter, is remanded to the custody of the father, William Potter; and the defendant is discharged.

In the case of *Maria Hewitt* v. *Jesse Long*, the supreme court of Illinois in passing upon the question of the right of the father and the mother to the custody of their minor children held.

"1st. THE FACTS.—The appellant, more than fourteen years before the commencement of this suit, married the appellee in Cass co., in this State, and, shortly before the birth of her daughter, he deserted appellant and went to Iowa. Soon after the lapse of the required two years she obtained a divorce from him, on the ground of desertion, and obtained a decree giving her the custody of Alice, her daughter. The father become wealthy in Iowa and married again, the daughter being about fourteen years old. On his petition in the Cass county circuit court he obtains a modification of the decree, allowing him the custody of his daughter and leave to take her to Iowa, upon his giving bond to produce her when required by the court. The daughter, who was examined, objected to being placed in the custody of her father; and the mother, who had married again, resisted the petition and appealed to the supreme court from the order modifying the decree, and the order is reversed. McAllister, J., delivers the opinion of the court, from which Breese, C. J., dissents, in an opinion in which Sheldon, J., concurs.

"2. THE COMMON LAW RIGHTS OF FATHERHOOD.—The court discusses the common law right of fatherhood, and says in disposing of the custody of children, the primary object should be the good of the children. Whenever the father becomes subject to the jurisdiction of the court in a proceeding for a divorce, his common law right to the custody of his infant children must necessarily yield to the discre-

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tionary power over the subject, vested by the statute, in the court.

"3. The Laws and Customs of this State are Her Birthright.—That Alice Long was born in this State, owes natural allegiance, and has certain independent personal rights. The laws and customs of this State are her birthright. It is by those laws, and the circumstances of her parents, that she became a ward of the court, and as such entitled to its protection and superintendence over her welfare. By those laws she will attain her majority and be entitled to the possession of her estate in the hands of her guardian, and to call him to account when she becomes eighteen years of age. whereas the common law is presumed to prevail in the State to which she is to be taken, and, by it, she will not be emancipated until she attains the age of twenty-one. It is the English rule, and one founded upon substantial grounds, that although the court may, under special circumstances, allow an infant ward to go out of the jurisdiction of, yet it will never compel his removal. Alice Long can not be removed from this State against her will.

"4. Modification of Decree Unjust to the Mother.—That the modification of the decree was clearly unjust to the mother. As these parties stand before the court, the father is the guilty, the mother the unoffending party. He has become a stranger to the child, deprived himself of her society by his own voluntary and deliberate act. He, judging him by his conduct, must be quite destitute of affection for the child, while the mother is bound to her by the strongest ties."
—*Legal News.*

This opinion was filed Oct. 9th, 1874, at Springfield, Ill.

Supreme Court of Illinois.

Central Grand Division—January Term, A. D., 1873.

THE PEOPLE OF THE STATE OF ILLINOIS v. WALTER W. HASTINGS et. al.

Original Suit on Collector's Bond.

1. A mistake of the auditor of public accounts in stating the account of a county collector, by which the collector's securities were prevented from obtaining indemnity from such collector, can not be pleaded as a defense to an action against the securities upon his official bond.

2. As between individuals, if one by words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act upon it, so as to change his previous condition, he will be estopped to deny the truth of the representation, but the rule is otherwise as against the State.

3. The State is not embraced within the Statute of Limitations, unless specially named, and by analogy does not fall within the doctrine of estoppel.

4. That no laches can be imputed to the government, and by the same reasoning which excuses it from laches and on the same grounds, it is not effected by the negligence or even wilfulness of any one of its officials.

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James K. Edsall, Attorney-General for the people.

Hon. E. M. Haines, counsel for defendants.

The opinion of the court was delivered by

Breese, J.—This is an original suit in this court, by The People against the sureties of the Treasurer and ex-officio Collector, of Lake county, on his official bond, a defalcation by the collector, in paying over a portion of the State revenue collected by him, being alleged in the declaration.

Formal pleadings were waived by the parties, and a decision sought upon an agreed state of facts, which brings up the question, and it is the only question in the case: Can the mistake of the auditor of public accounts, in stating the account of this collector, by which the defendants were prevented from obtaining indemnity from the collector, be pleaded as a defense to this action?

The defendants have submitted no argument to sustain their defense.

The Attorney-General on behalf of the plaintiffs, claims that the fact, that defendants were prejudiced by the erroneous and mistaken information they received from the auditor, would not constitute a defense, even as between natural persons, so long as such officer acted in good faith and without intention to deceive; that the doctrine of estoppel *in pais*, is based upon a fraudulent purpose and a fraudulent result; and, if the element of fraud is wanting, there is no estoppel. There must be deception and change of conduct in consequence, in order to estop a party from showing the truth, citing 2 Story Eq. Pl., sec. 1543.

The doctrine on this subject, we understand to be, that when a person by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things.

Text-writers denominate these estoppel by conduct, in order to [constitute] which all the following elements must be present: 1. There must have been representations concerning material facts. 2. The representations must have been made with

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knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with intention that it should be acted upon. 5. It must have been acted upon. In this connection it is said the representation here spoken of is one external to, and not necessarily implied in the transaction itself; and fraud or something tantamount thereto is now the distinctive characteristic of this kind of estoppel. Bigelow on Estoppel, Introduction, p. 60.

Some of the necessary elements appear in this transaction, but the essential one, fraud, is wanting. There is no pretence the auditor designedly misrepresented the state of the collector's account, and the extent of his liability. That officer is presumed to employ competent clerks and assistants, on whose fidelity and accuracy he must in most cases, implicitly rely, and must base his official statements on such communications or reports as they make to him. If they err, as they may sometimes, the error goes into his statement, and without any just impeachment of his fidelity, may be the cause of loss and injury to another. As between individuals, it is no doubt true, if one by words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act upon it so as to change his previous condition, he will be estopped to deny the truth of the representation. As between the government and an individual, we have found no case holding, the former would be estopped by any statement of its officials from recovering its own.

It is a familiar doctrine, that the State is not embraced within the statute of limitations, unless especially named, and by analogy would not fall within the doctrine of estoppel. Its rights, resources and property would be at a fearful hazard, should this doctrine be applicable to a State.

A great and overshadowing public policy of preserving these rights, resources and property from injury and loss, by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

The doctrine is well settled, that no laches can be imputed to the government, and by the same reasoning which excuses it

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from laches, and on the same grounds it should not be affected by the negligence, or even wilfulness of any one of its officials.

The State not being estopped by the mistaken statement of the auditor, judgment must be entered for the plaintiff for the amount admitted to be due, without interest; namely twelve hundred dollars and fifteen cents, and for which execution will issue.

Judgment for plaintiff.

In connection with the foregoing case we would call the attention of the profession, as bearing upon the question involved in the principal case, to the following cases: *People* v. *Berner*, 13 John., 383; *People* v. *Russell & Wood, sur., &c.*, 4 Wend., 570; *Niblo* v. *Clark*, 3 Wend., 24; *Andrus* v. *Bealls et al.*, 9 Cow., 693; *People* v. *Foot*, 19 Johnson, 58; *United States* v. *Kirkpatrick*, 9 Wheat., 720; *U. S.* v. *Van Zandt*, 11 Wheat., 184.

Supreme Court of Pennsylvania.

PITTSBURGH AND CONNELSVILLE R. R. Co. *v.* PILLOW.

The plaintiff below, lost an eye through the quarrel of a couple of drunken men, on a car in which he was a passenger. *Held*, that the company was liable, as it was the clear duty of its employees to repress all disorderly conduct in their cars.

Error to the common pleas of Alleghany county.

Opinion of the court by GORDON, J., delivered Jan. 4th, 1875.

Upon a careful examination of the plaintiff's points, we find them supported by the most ample authority, and hence conclude that the rulings of the court upon those points are throughout correct. In the case of *Meier* v. *The Pennsylvania Railroad Co.*, 14 P. F. S., 225, Justice Agnew quotes approvingly the language of Judge Bell, in *Laing* v. *Colder*, 8 Barr, 482, wherein he says, speaking of the duties which common carriers owe to the passengers whom they carry: "But though, in legal contemplation, they do not warrant the absolute safety of their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence or foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages." It is said

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further in the same case: "*Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it.

This is the rule when the injury is caused by a defect in the road, cars or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control, as a part of its duty to carry passengers safely, but this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility, by showing that the injury arose from an accident which the *utmost skill, foresight, and diligence could not prevent.*"

We can not perceive the force of the argument of the counsel for the plaintiff in error, wherein he endeavors to raise a distinction between accidents arising from negligence in the equipment or management of the train, and those arising from the misconduct of passengers upon it. If the employees of the road had no control or power over passengers, this argument would be sound. But they have such power, and they are just as responsible for its proper exercise as they are for the proper running of the train. That it should be so is most fully and forcibly exemplified in the present case.

The plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the cars, or if so permitted, should have been so guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls. The duties and powers of conductors are very clearly pointed out by Justice Woodward, in the case of *Hines* v. *The Railroad Co.*, 3 P. S. S., 512, in which he says: "They may stop their trains and call to their assistance, for the purpose of suppressing riotous conduct on board thereof, not only all the employees, but also all passengers that are willing to lend a helping hand, and until the utmost effort has been made for that purpose, the responsibility of the companies which they represent, for damage sustained by orderly passengers, remains."

We have a similar ruling in the case of *Flint* v. *Norwich & New York Transportation Co.*, 34 Conn. 554, in which it is

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held that it is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and that persons guilty of rude or profane conduct should be at once expelled. Such is the doctrine of the books. It is wise and good, and necessary for the protection and comfort of those who travel upon our railway lines, and who, from the very character of the means used for their transportation, are during such transportation, almost wholly dependent upon the railway officials for their safety and well being. JUDGMENT AFFIRMED.

The Albany Law Journal, of date, Jan. 16, 1875, in noting this case says: "In *Pittsburg, etc., R. R. Co.* v. *Pillow*, 7 Leg. Gazette, 13, the supreme court of Pennsylvania decided that where a passenger, on a railroad car, lost an eye through the quarrel of drunken men the company was liable to the injured passenger. The decision proceeds on the ground that carriers of passengers are just as liable for the misconduct of fellow-passengers, as they are for the mismanagement of the train. It is the duty of the company to maintain order; and if they are negligent in this respect and injury results to a passenger they are liable. In *Railway* v. *Hinds*, 53 Penn. St., 512, a passenger's arm was broken in a fight between drunken persons, and the company was held liable because the conductor did not stop the train and endeavor to expel the disorderly persons. In *Goddard* v. *Railroad Co.*, 57 Me., 202; S. C., 2 Am. Rep. 39, it was said that the carrier "must not only protect his passenger against the violence and insults of strangers and co-passengers; but, *a fortiori*, against the violence and insults of his own servants." In *Flint* v. *Norwich, etc., Transp. Co.*, 34 Conn., 554, it was held that it is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and that persons guilty of rude or profane conduct should at once be expelled. In *Putnam* v. *Broadway, etc., R. R. Co.*, 55 N. Y., 108, the principle of the foregoing cases seems to have been sustained; but it was held that where there was nothing in the condition, conduct, appearance or manner of the passenger from which it could be reasonably inferred that he was about to make an attack on a fellow-passenger, the company was not liable for a sudden attack on a passenger. It is not the duty of the conductor to remove a drunken person who is not disorderly or offensive, or who remains quiet after admonition from the conductor."

The Pullman Palace Sleeping Car Co., are not liable for the loss of property of a passenger on their cars. They are neither liable as innkeepers nor as common carriers. *Pullman Palace Car Co.* v. *Smith*, supreme court of Illinois. Opinion filed Jan. 30th, 1875.—*Chicago Ry. Rev.* page 18.

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Supreme Court of Illinois.

MARGARET PHELPS *v.* JACOB S. PHELPS, Ex'r., &c.

ERROR TO ST. CLAIR.

ANTE-FUPTIAL AGREEMENT—WIDOW'S ALLOWANCE—PCLICY OF THE LAW.

By the Statute of Wills, the widow in all cases is allowed certain specific articles of property for the benefit of herself and family, and the only question in this case is, is the widow barred of such right by the terms of an ante-nuptial agreement containing this provision: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each separately and distinctly by each, in the same manner as if they were and had continued unmarried; and upon the death of either party, his or her real estate and personal property shall pass to his or her heirs, executors and administrators, free from all claims of survivor."

Held, that where there is children of the decedent, constituting the family, that the award is as much for their benefit as for hers, and that she has no power to release it by ante-nuptial agreement or otherwise.

Wilderman & Hamill, for plaintiff in error.

M. W. Weir, for defendant in error.

The opinion of the court was delivered by

SCOTT, J.—The decision in this case depends upon the construction that shall be given to the ante-nuptial agreement between the petitioner and her late husband, Michael Phelps, deceased. Under our statute of wills, the widow in all cases is allowed certain specific articles of property for the benefit of herself and family, and the petitioner in this case would be entitled to the benefit of that provision, unless her right is barred by the terms of that agreement. The clause which it is insisted bars the right, is as follows: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each separately and distinctly by each, in the same manner as if they were and had continued unmarried, and upon the death of either party, his or her real estate and personal property shall pass to his or her heirs, executors and administrators free from all claims of survivor."

The decedent had children by a former marriage. It was provided that the issue of their marriage, if any, should inherit

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the estate of the husband equally with his other children. One child was born unto them, which was living with the widow at the time of filing the petition.

No doubt ante-nuptial agreements are to be construed liberally, for the purposes which they were intended to accomplish. The obvious meaning of the agreement in the case at bar is, that it cuts off all interest the widow would personally have by reason of her marriage, in the property of her husband, both real and personal; but further than that it does not go. It was certainly never contemplated that it would debar the wife of the right of support at the hands of her husband during his lifetime, nor release him from his obligation to support their children, the fruits of their marriage if there should be any. Neither party ever expected it to have such an effect. It was only intended to operate upon her interest in his property, but not to relinquish the means of support, which it was his duty to furnish her and her family.

That duty the law imposed upon him during life. Surely he was not released from his obligation in this regard, by anything contained in the ante-nuptial agreement. We are unwilling to adopt a construction that will have that effect. The law also charges the husband's estate with the support of his widow and his children residing with her for the period of one year after his death, at least to the extent of certain articles of property or their value in money. This latter right is one created by positive law, and attaches in all cases, whether there is sufficient property or not to pay the debts of the decedent. Being a statutory right, it is one of which the husband can not deprive his wife and children, any more than he can relieve himself of his obligation to support them while living. It is in no case affected by the widow renouncing or failing to renounce the benefit of the provisions made for her in the will of her husband or otherwise. Our laws on this subject have always been liberal, and the tendency of more recent legislation is to enlarge rather than abridge the benificent provisions in this regard. The same protection has been extended by statutory enactments to the minor children of the decedent, where he is a householder at the time of his death, and leaves no widow.

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The right of the wife to support during marriage, is not an interest strictly speaking, in the property of her husband. It is a benefit arising out of the marital relation by implication of law. Treating the provision which the law makes for the widow and his children residing with her, by the allowance of specific articles of property as a means of support, it can not be said to be an interest in the property itself of the husband. It comes within no definition of property. It is a benefit, created in their favor by positive law, and adopted for reasons deemed wise and politic.

The ante-nuptial agreement in this case, makes no allusion to these rights. Hence it can not be said that the petitioner has released her rights to the benefits of the obligations imposed upon her husband and his estate, which are to enure to her and her family in case of his death. Its effect would be to debar her dower in the estate of her husband, and prevent her from taking any position as heir under the statute; but it is an unreasonable construction to say that it deprives her of the provisions the law has made in her behalf, and for her husband's minor children, residing with her. The specific allowance is as much for the advantage of the children of the decedent as for his widow. It is an absurd conclusion, that any ante-nuptial agreement can deprive the children of the means of support in their tender years which the law has given. Should the construction contended for prevail, the debts of the decedent might exhaust the entire estate and leave the family in utter destitution. As we said in *Strawn* v. *Strawn*, 53 Ill., 263, it was the design of the legislature to furnish the necessary sustenance for the household for one year after the death of the husband. We are at a loss to understand how this humane provision of law for the family of a deceased party can be affected by an ante-nuptial contract, however broad and comprehensive its terms.

The suggestion, the petitioner may have had separate property at the time of her marriage, can make no difference in the decision of the case. She was not bound to use it for the support of his children to the exclusion of the estate of her husband. But, if that question was material, we can not know the amount of the property, nor that any portion of it was preserved

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until the death of her husband. So far as any thing appears in the record, the family may be entirely dependent on the estate. Independently of the question, whether there is sufficient property to discharge the debts, the law has appropriated to the widow and the family residing with her, such specific allowance as was deemed necessary for their support for one year, and made it a first charge upon the estate, to be first discharged to the extent there may be assets belonging to the deceased.

But there is another ground upon which the agreement may be held to be inoperative to the widow's awards. The statutory provisions that exempts a portion of a man's estate from the payment of his debts, for the maintenance of his widow and minor children for a limited period, was adopted from motives of public concern. It is, that they may not become a charge upon the eleemosynary institutions of the State as in many instances they would but for this humane provision of the law. It is undeniable law, that a party may waive the advantage of a statute intended for his sole benefit; but there are grave reasons why a law enacted for our public considerations should not be abrogated by mere private agreement. The statute we are considering is of this character. It was intended to throw around the persons named, that protection they are unable in their helplessness to procure for themselves. This is not a matter of mere private concern. It would be in contravention of the policy of this enactment to permit a party by an ante-nuptial contract to relieve his estate altogether from the maintenance of his widow and his children, when they could no longer sustain themselves. The statute has made a temporary provision for them, inadequate as it may be in many instances, and we think every principle of justice and humanity as well as due regard for the general welfare, require us to hold that a party may not, by private agreement, contract against the liability imposed; it would place upon the State or local municipality, the obligation the law has fixed upon his estate.

In *Kneettle* v. *Newcomb*, 22 N. Y., 249, it was ruled that a contract made by the head of the family, waiving the benefit of statutory exemptions, designed exclusively for the benefit of the family was subversive of the policy of the enactment, and hence

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illegal and void. The decision is part based upon the reasoning in *Woodward* v. *Murray*, 18 Johns., 400. See 10 How. Pr. R., 282. *Harper* v. *Leal*, upon the same point. Motives of public interest, cause the imposition of restraints on prohibitions as to the alienation of certain things, and even as to any dealings with them, the principle is, the citizen may not deal, even with his own property, in a manner detrimental to the general welfare or public safety. This is the doctrine of both the common and civil law. If the rule prevails as to articles of property, there is no just reason why it should not be maintained as to duties and obligations imposed by positive law. The statute which sets apart certain specific articles of property or their value in money, for the maintenance of the widow and family of the deceased, is in the nature of a charge upon the estate, dictated by the spirit of humanity, and adopted in accordance with an enlightened public policy; and to permit a party to contract against its salutory provisions is simply to abrogate the law itself, this cannot be done.

Were there no child or children of the deceased residing with the widow after his death, a very different question would be presented. The award would be for her sole use in such case, and might be treated as a personal right, which she could if she chose relinquish. But it is otherwise where there are children of the decedent constituting the family, the award is as much for their benefit as for hers, and she has no power to release it by an ante-nuptial agreement or otherwise. The policy of the law is, to provide a home for the family, that the domestic circle might remain unbroken during the period for which provision is made for them, notwithstanding the death of the husband. To effectuate that purpose it is necessary that the widow should share in the benefits of the award. For the reasons indicated, the judgment of the circuit court will be reversed and the cause remanded, with directions to affirm the judgment of the county court, granting the prayer of the petition.

DECREE REVERSED.

WALKER, C. J., dissents.

Hathaway v. *Hathaway's* estate, 46 Vermont, not yet reported, was a case in some respects similar to the principal case. The plaintiff, Mrs. Hath-

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away, was the second wife of the intestate, who died without issue of their marriage. An ante-nuptial agreement was entered into between them, whereby a pecuniary provision was made for her in lieu of dower, and whereby she covenanted to claim no share in his estate, otherwise than according to the provision of said agreement. The plaintiff did not elect to waive the provision made for her by said agreement, but induced by the fraud and artifice of the only son and sole heir of the intestate, accepted and received the same in full of all claim against said estate, and retained the same without offering to restore it to the estate.

On this state of facts, it was held that the plaintiff was thereby barred of dower and homestead. It was also held, that without waiver of said provision, and notice of it in writing, the probate court had no power to decree plaintiff homestead and dower, although the said provision was wholly inadequate for her support. The probate court, on the plaintiff's application, caused homestead and dower to be set out to her, from which proceeding the appeal was taken. It was held that, although such proceeding might be considered as equivalent to a decision, that said provision was not sufficient for her support, and to an extension of the time for making election. Yet that it could not supply the indispensable requisite of election, waiver and notice thereof in writing, to the probate court, acts to be done by the plaintiff.

A GOOD RULE IN DIVORCE CASES.

Owing to the fact that applications for divorce have become so frequent, and believing that decrees are too easily obtained, the judge of the fourteenth circuit, of the State of Illinois, has determined to adopt the following practice:

The court will personally hear all applications for divorce, and a day will be set for the hearing of such cases, due notice of which will be given to the bar.

In each case where there is no counsel appearing for defendant, the court will appoint some attorney to act as "*amicus curiæ*," whose duty it will be to examine carefully papers and witnesses, and prevent decrees unless sufficient cause is shown.

We think this will be but simple justice to all concerned, and especially just to the court, the defendant and the public.

It is to be regretted that the impressive injunction, "whom God hath joined together, let no man put asunder," is frequently and wrongfully violated.

Courts should be no star chambers, where "divorces can be procured with secrecy and dispatch."

Heretofore it has been an easy matter where there is no opposition, to procure witnesses and prove up a case; and judges have not time to fully investigate each particular case; hence the rule for appointing of an "*amicus curiæ*" in divorce cases, where there is no counsel for defendant, will be followed in the fourteenth circuit.

H. G. R.

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Supreme Court of Pennsylvania.

GILMORE et al. v. REED.

The running of the statute of limitations against a claim which defendant interposes as a set-off, is not stopped by the commencement of the suit. It is not stopped until the set-off is pleaded.

Error to the court of common pleas of Clarion county.

Opinion of the court by MERCER, J., delivered Jan. 4th, 1875.

This case presents the question whether the commencement of a suit stops the running of the statute of limitations against a claim which the defendant interposes as a set-off, or whether it is not stopped until the set-off is pleaded.

The first section of the act of 1705, Pur. Dig. 487, pl. 1, makes it lawful for a defendant to give in evidence "any bond, bill, receipt, account or bargain," which he held against the plaintiff at the commencement of the suit. He is thus permitted, but not required, to introduce his set-off in a suit brought in a court of record. An omission to do so is no bar to his claim in any other action. Even if it be pleaded, yet it is in the nature of a cross action, and the defendant may withdraw it from the consideration of the jury. *Muirhead* v. *Kirkpatrick*, 5 Watts & Serg., 506; *Idem*, 2 Barr, 425. Nor does the pendency of a suit brought for its recovery, prevent its being set-off in another action. *Filbert* v. *Hawk*, 8 Watts, 443; *Stroh* v. *Ulrich*, 1 Watts & Serg., 57.

By pleading a set-off, a defendant can not prevent the plaintiff from suffering a non-suit, even after issue joined in the plea. *McCredy* v. *Fey*, 7 Watts, 496.

The statute of limitation does not *per se* apply the demand of one party to that of the other, so as to produce either payment, satisfaction or extinguishment of either. *Hinkley* v. *Walters*, 8 Watts, 260; *Idem*, 9 Watts, 179.

If the defendant plead set-off, the plaintiff may reply the statute of limitations to such demand. *Idem*, 8 Watts, 264. In the case now under consideration, the defendant in error did so reply. If the defendant goes to trial without demanding a replication to his plea of set-off, the defense to the set-off is unre-

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stricted, and the plaintiff may avail himself of the statute of limitations, or any other defense. *Coulter* v. *Repplier*, 3 Har. 208.

It is optional with a defendant to interpose his set-off. If he does so, it is in the nature of a cross action. If he commences a separate action for the recovery of his claim, the running of the statute will stop at that time. If, on the other hand, he elects to use his claim as a set-off, we think the time when he so elects by his plea, or by notice to the plaintiff, is logically and justly the time when the running of the statute of limitations is stopped.

If a defendant having a claim against a plaintiff, neglects to bring an action for it, as he may, and thereby suffers it to be barred by the statute of limitations, his loss is caused by his own folly or negligence.

It follows then that the learned judge correctly held the items pleaded as a set-off by the plaintiffs in error, which were due more than six years before he entered his plea of set-off, were barred by the statute.

JUDGMENT AFFIRMED.

It would seem that the doctrine announced in the principal case, applies also to plaintiffs, in case of amendment of the declaration by adding new counts, and setting up new causes of action. In one of the cases of the *Illinois Central R. R. Co.* v. *O. P. Cobb, Christy & Co.*, supreme court of Illinois, June term, 1872, was an action for non-shipment of a large amount of grain. In the original declaration various shipments were set out. Afterwards, the plaintiffs, by leave of the court, filed two amended declarations, setting up shipments of corn by different persons, from different places, and at different times, from those described in the original declaration. Defendant pleaded the statute of limitations to these additional counts, to the effect that the cause of action did not accrue within five years before they were filed, or before leave was given to file them, with an averment that they set up new causes of action. The court sustained a demurrer to this plea.

The supreme court, in passing upon this question, say: "We are of opinion the plea was good. The new counts set up entirely new causes of action. Counsel for appellees cite various authorities for the purpose of showing that courts should be liberal in allowing amendments for the purpose of avoiding the running of the statute. These authorities, however, are cases where the amendment was for the purpose of restating the cause of action in the pending suit, and not for the purpose of introducing a wholly new and different cause of action. The rule contended for by appellees would substantially break down the protection intended to be given by the statute. If A has two notes against B, one of which is barred by the statute and the

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other not, he could not enforce payment of the first note by joining it in a suit upon the second. If, however, he commences suit on the second before the statute has run against either, and afterwards, the statute having run in the meantime against the first note, seeks to recover upon it by adding a new count to his declaration in the pending suit, it is claimed he may do so. Why should this be permitted any more than to write in the first instance, a note barred, with one not barred? The two cases are the same in principle. When a new count is added a distinct suit could not be brought on the outlawed note, and it has not been included in the pending suit. How, then, can its payment be enforced by adding a new count in the pending suit? How can a note which the law pronounces dead, be vitalized by amending the declaration in a suit brought upon another cause of action? This seems plain upon principle, but we cite the following authorities: ***King* v. *Avery***, 37 Ala., N. S., 173; ***Holmes* v. *Trout & Moreland***, 1 McLean 1, affirmed in 7 Pet., 171; ***Woodward* v. *Ware***, 37 Me., 564; ***Skowhegan Bank* v. *Cutler***, 49 ib., 315.

Court of Appeals of Kentucky.

COMMONWEALTH v. WILSON.

The court will not proceed to try an appeal from a criminal court, when the appellant is not in the power of the court.

The defendant, Wilson, was convicted of murder in the Boyle circuit court, and sentenced to the penitentiary for life. An application by counsel, to the appellate court, for an appeal was granted. The prisoner having escaped, the Attorney-General entered a motion to dismiss the appeal, on the ground that the appellant was not in custody, to abide such judgment as might be rendered, and had no right to prosecute the appeal.

The court decided: "It seems to this court clear, both upon principle and authority, that the motion ought to be sustained. If the court proceeds to try this appeal, the appellant can not be compelled to submit to its decision should it be against him, and he ought not, therefore, be allowed to reap the benefit of a decision in his favor. In the case of the *State* v. *Ripon*, Second Bay, 99, it was held by the supreme court of South Carolina, that whenever corporal punishment was either probable or certain, the defendant should be in the power of the court before they proceed to hear a motion for a new trial. The motion is sustained and the appeal dismissed."

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TWELVE JURORS IN THE BOX.

Our statute, Hurd's Stat., § 21, p. 634, provides, that "upon impaneling of any jury in any civil cause now pending, or to be hereafter commenced in any court in this State, it shall be the duty of the court upon request of either party to the suit, or upon its own motion, to order its full number of twelve jurors into the jury box, before either party shall be required to examine any of the said jurors touching their qualifications to try any such causes. *Provided*, that the jury shall be passed upon and accepted in panels of four, by the parties commencing with the plaintiff." With us, and as used in this connection, the word *impaneled* means the final formation by the court of the jury. It is the act that precedes the swearing of the jury, and which ascertains who are to be sworn. By section 23 of the act above cited, it is provided, that "the provisions of this act shall apply to proceedings in both civil and criminal cases." Under a similar statute in Wisconsin, the supreme court of that State, in the case of *Larub* v. *State*, decided in 1874 and unreported, held that, in the impaneling of a jury for the trial of a criminal prosecution, twelve jurors must be *called in the cause*, before the accused can be put to his challenges, and the full number of twelve unchallenged and unsworn jurors must be maintained in the box until the parties have exhausted their challenges, or accept the jury. Then, and not before, the jury should be sworn in the cause. In this case each juror was called singly, singly questioned for ground of challenge for principal cause, and for favor, and none such appearing, was singly submitted to the parties for peremptory challenge before another was called, and if not challenged was at once sworn in the cause, and so on until the jury was full. This mode of impaneling the jury was held erroneous, for which a judgment against the accused was reversed. The parties under the statute are entitled to twelve unsworn and unchallenged jurors in the box until the panel is accepted. In *Spencer* v. *DeFrance*, 3 Green, (Iowa,) 217, the court say: "However, after a party has once accepted a jury and there is no separation of the jury or intermission of the court,

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between such acceptance and the time the jury are called upon to take the oath, the party then objecting should advance some substantial reason why he did not at the usual time avail himself of his peremptory challenge.

"If the party has been taken by surprise, by hastily accepting the jury, and if, upon further reflection, he becomes satisfied that there is a partial or prejudiced mind in the box, or if, with unusual haste he has been forced to accept the jury without having had proper time for reflection or consultation in furtherance of justice, we think the court should permit the party to exercise his peremptory challenge. Of course good care should be taken that the party in raising the objection after having signified his willingness to take the jury is actuated by pure motives, and not by a mere disposition to disturb the panel, and delay the trial of the cause.

"But if the jury become separated after they are impaneled and accepted, and thrown into positions where they are liable to become impressed by designing men, we think counsel have a right to an unrestrained exercise of their challenge, up to the very moment that the jury are required to take the oath."

The general court of Virginia, in *Hendricks' case*, 5 Leigh., 707, state the right still stronger, holding "that the right of the prisoner to challenge any juror peremptorily is absolute at any time before the jury is sworn, and that no circumstances can bring that right within the discretion or control of the court, so long as it is confined to the number of peremptory challenges allowed by law." See also, *McFadden* v. *Comm.*, 23 Penn. St., p. 12, where it is held that a challenge may be made on the part of the commonwealth at any time before the oath is tendered to the juror; and the mere passing of the juror by the district attorney, over to the party charged, or his counsel, is no waiver of the right of challenge on the part of the commonwealth. An examination of the above authorities lead us to the conclusion, that twelve men must be kept in the box unchallenged and unsworn until the panel is accepted, and that the acceptance of the panel by fours, under our statute does not absolutely preclude the party from his right of peremptory challenge, until the full panel shall have been accepted and sworn in the cause.

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Supreme Court of Pennsylvania.

McLAUGHLIN v. CITY OF CORRY.

A municipal corporation is responsible for the damage resulting to a foot passenger, from an accident to him, caused by the dangerous accumulation upon the sidewalk of a street, of ice and snow.

Error to common pleas of Erie county.

Opinion of the court by GORDON, J., delivered Jan. 4th, 1875.

That a municipal corporation, such as a city, borough, township, or county, is liable for damages arising from the neglect of its officers in not keeping the streets, roads and bridges, over which it has jurisdiction, in proper repair, is established by many authorities; among others, *Dean* v. *New Milford T'p.*, 5 W. & S., 545; *Pittsburgh* v. *Grier*, 10 Har. 54; *Allentown* v. *Kramer*, 23 P. F. S. 406; *Humphreys* v. *Armstrong County*, 6 P. F. S., 204.

These cases proceed upon the principle that the various municipalities have full and complete control of and power over the roads, streets and bridges within their several precincts, and that they are charged with the duty of their proper construction and repair. In the case in hand, the plaintiff charges, that through the default of the officers of the city of Corry, the ice and snow had been permitted to accumulate upon the sidewalk in question, in such a manner as to be dangerous to foot passengers, and that by reason thereof he fell and received the injuries of which he complains. Whether this were so or not, was a question for the jury, and as such the court should have submitted it to them.

If the city authorities were negligent in allowing a dangerous obstruction to exist in the public highway, which they could have removed, and the plaintiff was injured thereby, without any fault of his own, the city was undoubtedly liable for the damages which he suffered.

It is argued, however, that, as the obstruction complained of was the result of natural causes, over which man has no control, therefore the defendant is not liable. This would be true if the effects produced by these causes were beyond human remedy; but ordinarily such is not the case. Roads are constantly

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being worn by the never-ceasing action of the elements; but no one imagines that this is an excuse for a neglect to repair them. A sudden flood may render a public bridge or highway impassable, but surely that is no reason for allowing it to remain so forever. A municipality can not prevent the general slipperiness of its streets, caused by the snow and ice during the winter; but it can prevent such accumulations thereof, in the shape of ridges and hills, as render the passage dangerous. It is no more difficult to remove or level such obstructions than it is those occasioned by the water and earth during the summer. The cases of *Collins* v. *Council Bluffs*, 32 Iowa, 324; *The City of Providence* v. *Clapp*, 17 Howard, 161; *Luther* v. *Worcester*, 97 Mass, 269, all hold that municipal corporations are liable for damages occasioned by accumulations of snow and ice. The plaintiff's second, sixth and seventh points should have been affirmed. If the obstruction was one of such long duration as to be generally observable, the city would be charged with constructive notice thereof. So the true measure of damages, in addition to that indicated in the seventh point, would be the plaintiff's actual permanent loss of earning power, occasioned by the accident. What he gets from his present employers by way of wages, can not go in mitigation of damages, any more than would the donations of friends and neighbors; but what he earns from any source may, with other things, be considered as going to prove what his earning powers actually are.

The third point embraces a question of fact for the jury, and was, therefore, properly refused.

The judgment is reversed, and a *venire facias de novo* awarded.—*Legal Gazette.*

STOKES et al. v. THE PEOPLE, 63 Ill., 489.

In this case it was held, upon the authority of *Wheeler* v. *The People*, 39 Ill., 430, that on a *sci. fa.* upon a joint and several recognizance, where service is had on one or more of the cognizers, and a simple return of *nihil* as to the rest, execution may be awarded against those served with process. But that an execution could not be awarded against the parties not served. until the return of two *nihils*. Evidently the attention of the court was not called to the statute laws of 1869, page 113, § 9. See also, Hurd's Stat. page 397, § 10.

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Supreme Court of Illinois.

ILLINOIS CENTRAL RAILROAD Co. v. COBB, BLAISDELL & Co.

APPEAL FROM ALEXANDER.

LIABILITY OF COMMON CARRIERS—EVIDENCE—MEASURE OF DAMAGES—INTEREST—INSTRUCTIONS—DEGREE OF PROOF REQUIRED.

1. This was an action of assumpsit brought by appellees against appellant for unreasonable delay in the transportation of corn and oats shipped at various stations on the line of appellants road, in the spring of 1865, consigned to Cairo. *Held*, that if appellant failed to transport the grain to its point of destination within a reasonable time, and the price of the grain declined in the market at Cairo, the point to which it was consigned, then appellees would be entitled to recover the difference between the market price at Cairo, when it should have arrived and the time it actually arrived; or if, in consequence of the delay there ceased to be a market for the grain at Cairo, then it would have been the privilege and right of appellees without reasonable délay to ship the grain to some point where it could have been sold for the most advantageous price, disposed of it to the best advantage and held the appellant for the loss.

2. The price for which appellees sold oats at that time in Cairo, held competent as showing the market price of oats in Cairo at that time.

3. For the purpose of establishing the market price of corn, appellees introduced in evidence a correspondence between them and Bacon & Co. *Held*, that the testimony was incompetent.

4. The recovery of interest depends entirely upon the statute and unless authorized by the statute it cannot be recovered.

5. The measure of damages was the difference between the market price at Cairo when the grain should have arrived, and the market price when it did arrive; and, if there was no market for it in Cairo, appellees were bound to find a speedy market and dispose of it on the most advantageous terms, and the difference between the market price when it should have arrived, and the price thus received, would be the measure of damages.

6. In a case like this, it is not enough for the appellees to show they received a specified sum for the grain and then stop, but the burden of proof is on them, to clearly prove the disposition made of the grain, the price received and the expenses, &c.

7. The effect of shipping receipt, showing that the grain was shipped in apparent good order.

Opinion filed Feb. 8th, 1875.

Green & Gilbert, and *Williams, Burr & Capen*, for appellant.

W. J. Allen and *D. T. Linegar*, for appellees.

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The opinion of the court was delivered by

CRAIG, J.—This was an action of assumpsit, brought by appellees against appellant, to recover damages for unreasonable delay in the transportation of corn and oats shipped at various stations on appellants road in the spring of 1865, consigned to Cairo.

A trial of the cause was had before a jury which resulted in a verdict against appellant for $43,560.25. A motion for a new trial was entered, which the court overruled and rendered judgment upon the verdict.

The appellant brings the record here by appeal, and assigns various errors for a reversal of the judgment, which, so far as may be material to a correct decision of the points, material in the case, will be considered.

The question raised by appellant, in regard to impaneling the jury, it is not necessary to consider, as the judgment will have to be reversed upon points arising upon the merits of the case, and upon another trial there will probably be no difficulty in the parties selecting a jury according to the plain provisions of the statute which will be acceptable to each.

Appellees upon the trial, introduced evidence tending to prove that the corn and oats involved in this action, after they had been delivered to the railroad company for shipment, should have arrived at Cairo, by the 10th day of April, 1865, if no unreasonable delay had occurred in the transportation.

The evidence shows the grain did not arrive at that time, but on the contrary, the first car arrived on the 17th day of April, and from that time the grain continued to arrive until the 20th day of May.

It is clear, that if appellant failed to transport the grain to its point of destination within a reasonable time, and the price of the grain declined in the market at Cairo, the point to which it was consigned, then appellees would be entitled to recover the difference between the market price at Cairo, when it should have arrived and the time it actually arrived; or if, in consequence of the delay, there ceased to be a market for the grain at Cairo, then it would have been the privilege and right of appellees without unreasonable delay, to ship the grain to some

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point where it could have been sold for the most advantageous price, disposed of it to the best advantage, and hold the appellant for the loss.

It follows then, that one of the vital facts in the case for the jury to determine, was the market price of the grain at Cairo, when in due course of transportation it should have arrived, and the market value at the time it actually arrived.

Upon this point in the case, the plaintiff introduced evidence tending to prove the market price of oats to the 10th day of April, was from ninety to ninety-five cents per bushel; they then introduced evidence tending to show that they realized less than thirty-five cents per bushel for the oats after its arrival.

For the purpose of rebutting the *prima facie* case made by appellees, appellant offered to prove that on the 9th day of May, 1865, a day upon which the grain was arriving, appellees sold between five and six car loads of oats at seventy-five cents per bushel. This evidence was objected to and the court would not permit it to go to the jury.

There can be no doubt but in this ruling of the court there was error, and that too upon a point very material in the case.

If appellees sold oats in Cairo at that time for seventy-five cents per bushel, that was a fact proper for the consideration of the jury, tending to establish the market of the grain at that date, and we are unable to conjecture upon what principle, appellant was denied the right to establish the market value of oats at that time.

The fact that appellees had proven they realized only thirty-five cents per bushel for the oats, renders the error of the court still more apparent, and clearly establishes the necessity for the admission of the rejected evidence.

For the purpose of establishing the market price of corn, appellees introduced in evidence a correspondence between themselves and a firm of Bacon & Co.

The defendant was in no manner whatever connected with these letters, and we are aware of no rule of law under which they were admissible.

Had appellees desired the evidence of Bacon & Co. upon this branch of the case, they should have called them as wit-

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nesses, when their testimony could have been subjected to a cross-examination. Neither the letters of Bacon & Co., or those of appellees, written to them were competent evidence to go to the jury, and it was error for the court to permit them to be read as evidence.

The next question presented arises upon the 23d instruction given for appellees, which is as follows: "The court instructs the jury, that in this case they may allow interest if they believe from the evidence that the circumstances of the case are such as amounts to a conversion of the property by the defendant, or that there was fraud on the part of the defendant or its agents, or that there was a gross neglect of duty by the defendant, as to whether interest should be allowed or not. You are to be governed by all the facts and circumstances in evidence before you touching the character, degree and extent of defendant's neglect or breach of contract or duty."

Under this instruction it is evident from the amount of the verdict the jury allowed interest.

At the common law interest was not allowed in any case, its recovery depends entirely upon our statute, and unless authorized by the statute it cannot be recovered. *City of Pekin* v. *Reynolds*, 31 Ill., 530.

While our statute has received a liberal construction, yet we are aware of no case similar to the one under consideration, in which interest has been allowed.

In *Bradley* v. *Geiselman*, 22 Ill., 494, the recovery of interest was sustained, the action was however trespass, where property had been wrongfully taken and sold and converted into money.

In case of *C. & N. W. R. W. Co.* v. *Ames*, 40 Ill., 249, interest had been recovered and the judgment was sustained. The facts in that case however would have authorized an action of trover for a wrongful conversion of the property.

The same may also be said of the case of *Northern Trans. Co.* v. *Sellick*, 52 Ill., 249, where a recovery of interest was sustained.

In *C. & N. W. R. W. Co.* v. *Schultz*, 55 Ill., 421, the recovery of interest was sustained on the authority of *Bradley* v. *Gei-*

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selman, *supra*, the action having been trespass to personal property. These are the authorities in our own State, cited and relied upon by appellees, to justify the recovery of interest in this case, but they do not sustain the position assumed. The doctrine established by these authorities is, where property has been wrongfully taken or converted into money, and an action of trespass or trover may be maintained, interest may properly be recovered, and this is based upon the statute which authorizes interest, when there has been an unreasonable and vexatious delay of payment.

There can be no difference between the delay of payment of a moneyed demand, and one where property has been wrongfully taken, or taken and converted into money or its equivalent, the two rest upon the same principle.

But in this case there is no pretense of a trespass or conversion of property, or of any fraud practiced.

The action is based solely on the alleged fact that appellant failed to ship and deliver grain within a reasonable time, and that the grain was damaged in *transitu*.

If interest could be recovered upon the facts disclosed by this record, we can scarcely conceive of any action brought to recover damages in which it might not be allowed.

The instruction was not authorized by the facts in the case, and should not have been given.

It is insisted by appellant, that the court erred in giving appellees second instruction, which was as follows: "If you believe from the evidence, that plaintiffs are entitled to recover upon the counts in their declaration upon corn and oats, then the measure of damages in relation thereto is the difference between what they were actually able to realize for said grain, and what they would have realized for the same had it arrived at its destination without unreasonable delay, and this amount you are to determine from the evidence."

This instruction does not correctly state the law. Appellees upon the arrival of the grain, if there was then no market for it in Cairo, were bound to find a speedy market and dispose of it on the most advantageous terms. Yet under this instruction, they could hold the grain in store at a heavy expense until the

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entire value of it would be consumed by storage, and then recover the full market price of the appellant at the time it should have arrived. Such would not be just, and we cannot give it our sanction.

It is but equitable to require appellees to prove clearly the disposition made of the corn and oats after its arrival. If it was stored, they should show how long and at what expense. If sold, the price the grain brought should be given and the expense of sale.

It is not enough for them to show they realized a specified sum for the grain and there stop.

It is also insisted by appellant, that the court erred in giving appellees nineteenth instruction, which read as follows: "If the jury believe from the evidence that the defendant received the corn and oats claimed to be in a damaged condition when it arrived, and gave bills of lading, acknowledging the receipt of such grain in apparent good order, then such bills of lading are *prima facie* evidence that the grain mentioned in such bills of lading, was at the time it was shipped, in good order and condition, and is binding on the defendant unless rebutted, and to overcome such *prima facie* evidence it is incumbent on the defendant to introduce such evidence as will show to the satisfaction of the jury that such grain was not in fact in good order and condition."

The exception taken to this instruction we do not regard as tenable.

When a common carrier receives goods for shipment, and gives the consignor a bill of lading, in which the goods are described to be in apparent good order, we see no reason why the bill of lading should not be held *prima facie* evidence that the goods were in good condition.

This was held to be the law in *Bissell v. Price*, 16 Ill., 408, and the same doctrine was re-affirmed in case of *Great Western Railroad Co.* v. *McDonald*, 18 Ill., 172.

For the errors indicated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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THE POWER OF COURTS TO LIMIT ARGUMENTS IN CRIMINAL CASES—THE POWER DISCRETIONARY IN THE COURTS.

Section nine of article two of the constitution of Illinois, provides that, "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." A similar provision will be found in most if not all of the State constitutions; and the question is, can the circuit courts limit the time in which a defendant's counsel shall address a jury in a criminal case. The right to be heard exists, and under the provision of the constitution above cited, can not be taken away. In *Word's case*, 3 Leigh., 743, it was held, that upon the trial of a question of fact in a criminal case, the accused has a right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached and conclusive the evidence in its opinion may be, but that the court has a superintending control over the course of the argument, to prevent the abuse of that or any other right of counsel under this discretionary power. The courts must take care not to abuse these rights on the one side nor on the other. There are cases in which the time necessary to a proper and fair elucidation of the matters involved in the prosecution must be greater than in others. The courts must not arbitrarily cut down the time in all cases to a certain limit. They must exercise proper discretion in such matters, granting longer or shorter time as the intricate mass of matter, nature of offense, and the means or circumstances on which the defense may seem to require. The supreme court of Missouri, in discussing this question in the case of *State* v. *Page*, 21 Mo., 259, say: "This matter of limiting the time to be occupied in the prosecution of causes before courts of justice, is of very ancient origin. It is found among the Greeks, and was carried thence to Rome. The Greeks had their instruments by which they measured time, in the halls of judicature. The clepsydra was used: it was an instrument by which they measured time, by the means of the flowing of water through it; and so frequent and common was the practice of limiting the time to the speakers by water flow-

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ing through these instruments, that the word water was used metaphorically for time. When a speaker was allowed to speak so long, they said he was allowed so much water. The Greeks had an officer in their courts of justice whose duty it was to watch this measuring of time, and when a certain amount was allotted to a speaker, if there were any documents to be read during his speech, the time the reading of such documents consumed, was not to be estimated as any part of what had been allotted to him, therefore this officer whose station was near the clepsydra, stopped the water while the documents were being read. The orator did not waste his water in reading documents.

"Pliney tells us that he was allowed ten large amphora of water once, and so important was the cause in which he was engaged, that the judges added four more to the amount. He says he spoke five hours. He tells us likewise, that he himself used to allow the accused as much water as he wanted.

"The tribune of the people, Titus Libienus, only allowed half an hour to Cicero, to speak in defense of Caius Rabirius, when he was prosecuted for murder. This too on an appeal from the judgment of the duumviri to the people. The orator complained of being cramped by the narrow space of time; 'for, though it would be nearly enough to make the defence for his client, it would not be enough for preferring the complaints he had a right to bring forward.' 'I have spoken the time allowed me,' he said when about to conclude, and in no part of the monument erected by his genius to its own immortality will you find a more polished or more brilliant gem than this half hour's work."

It would appear to be within the discretion of the court, at the close of the evidence in a criminal case, to limit the time to be occupied by the defendant's counsel in addressing the jury, and that unless such discretion be allowed, the courts of last resort will not interfere with it. But it would seem to be manifestly just in most cases, where a question of character or personal liberty is at stake, to allow counsel the desired time, unless such time should appear manifestly unreasonable; but in the smaller cases where no principle is involved, courts may with

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great propriety limit the argument, as said by the supreme court of Mo., in *State* v. *Page*, *supra*. "We conclude therefore, that a quarter of an hour allowed * * * in a petty case of cutting down timber on the school land, can not be considered as an inhibition to be heard in defense of his client."

SUPREME COURT REPORTS.

A bill has been introduced in the State legislature, by Mr. Winter, of McLean, for the more speedy and economical publication of the Supreme Court Reports of this State.

Section first, provides for the appointment of a reporter by the supreme court, and requires the reporter to file bond in the sum of $10,000 for the performance of his duties.

Section second, prescribes the duties of the reporter, and gives him the exclusive right to publish the reports; and requires all volumes to equal in binding, printing, style and size, vol. 61 Ill. Reports.

Section third, limits the price of the reports to $3.50 per volume, and requires that each volume be published and ready for sale and delivery within six months from the time the supreme judges deliver to said reporter the manuscript opinions for the particular volume.

Section fourth, protects the reporter in his rights, and provides against any violations of section third by the reporter.

Section fifth, provides for the removal of the reporter for failure to comply with the provisions of this act.

Sections six and seven, provide for the publication of the reports by the State in case no person qualifies as reporter, and makes it the duty of the Attorney-General and Secretary of State, together with the State Treasurer and Auditor, to publish the reports under the provisions of chap. 127 Rev. Stat., and to sell said reports at $3.50 per volume.

To our mind, no satisfactory explanation can be given for the dilatory publication of the reports; and the legislature should provide some way for their more speedy publication.

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LIABILITY OF RAILWAY COMPANIES FOR DELAY.

The county courts offer valuable facilities for enforcing punctuality on railway companies. Several decisions have been given in actions brought by passengers, and all, with one exception, have been adverse to the companies. In the most recent case, the Great Western Railway Company, who were defendants, relied upon a notice prefixed to their time-tables, that they would not be accountable for any loss, inconvenience, or injury arising from delay or detention, unless upon proof that it arose "in consequence of the willful misconduct of the company's servants." The plaintiff took a first-class ticket from Reading to Henley by the train timed to arrive at Reading at 10.25 and to leave Reading at 10.30, to arrive at Twyford at 10.40 and to leave Twyford at 10.45, and arrive at Henley at 11 A. M. The train arrived at Reading punctually at 10.25, but did not leave Reading till 10.39. On arriving at Twyford the plaintiff found that the train to Henley had just left, and there was no other for an hour. He took a fly and got to Henley in half an hour. The delay at Reading was occasioned principally by the want of porters to put luggage into the train. The train was a very light one. the plaintiff being the only first-class passenger. The plaintiff, who is a solicitor and treasurer of the county court of Henley and other places, sued the defendants for *6s. 6d.*, the expense of a fly from Twyford to Henley. The plaintiff admitted that he was cognizant of the notice already quoted.

Upon these facts three questions arose: (1.) What was the contract between the company and the plaintiff? (2.) Was that contract affected by the notice? (3.) Was the notice itself affected by "willful misconduct" of the company's servants?

The answer to the first question is easy. The contract between the company and the plaintiff was to convey the plaintiff to Henley in a reasonable time; and the question of reasonable time is no longer left at large, but is fixed by the company's time-table, subject to accidents which reasonable care could not provide against. This contract arises on the purchase of a ticket, unless it be qualified by the notice; and thus comes the second question, to which the obvious answer is, that the notice is *ultra vires* so far as it professes to attach to the right of traveling on the company's own line the condition that the company will not be responsible for any shortcoming of their servants not amounting to willful misconduct. Thus far we have adopted the substance, and almost the exact words of the judgment given in the Reading county court, and the answers to the first two questions are enough to decide the case. Upon the third question, whether there was "willful misconduct of the company's servants," the judge of the county court thought, "with some doubt," there was; and here we incline to differ from him. But if he were wrong, his error would not affect the soundness of his judgment on the main question. It was stated by the plaintiff, and not denied by the defendants, that "the delay at Reading was occasioned principally by the want of porters to put luggage into the train." It appears to us an abuse of language to say that this delay "arose in conse-

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quence of the willful misconduct of the company's servants," which are the words of the notice. The porters at Reading are no more able than other people to do two things at one time. If there are not enough of porters to do the work of the station, the fault must lie with the managers of the company or with the company itself, but in neither case should we think the expression "willful misconduct" applicable. Upon this point we are not without authority, and it happens to be furnished by another case against the same company. In this case the plaintiff's goods were placed in a truck to be attached to a train passing the High Wycombe station late at night. The train brought some cattle to the station, and the defendants' servants, in order to prevent the cattle from being kept in their trucks till the next day, drove them into a yard, from which they strayed upon the railway, and upset the train, thereby injuring the plaintiff's goods. The plaintiff had undertaken to relieve the defendants from liability for damage unless it arose from "willful misconduct" of their servants. When this case came before the court of Queen's Bench, Mr. Justice Blackburn said that there was admittedly no malice in what the servants did, and he agreed that there might be many cases of willful misconduct without malice, but he did not agree that culpable negligence was necessarily willful misconduct. The cattle were driven into a yard which communicated with the line. This was not the usual course of proceeding, but the object of doing so on this occasion was to deliver the cattle to their consignees that night. There might have been some neglect by the company's servants, but "I can not see," said the learned judge, "how they can possibly be said to have been guilty of willful misconduct." There was nothing to show that what they willfully did—that is, drive the cattle into the yard—was likely to cause injury to the plaintiff's goods, or that they had knowledge of any danger to which they were exposing either the cattle or the train by what they did. Mr. Justice Quain remarked on the difficulty of defining the negligence which amounts to willful misconduct so as to justify a conviction for manslaughter. "Something of the same kind," he said, "is intended here; but without defining it exactly, it is sufficient that the facts here show no culpable negligence at all, and negligence must be culpable to constitute willful misconduct."

An appeal is, we believe, intended from the judgment of the Reading county court, and the company may rely on the case we have quoted to establish that there was no "willful misconduct of their servants," causing the plaintiff to be delayed in his arrival at Twyford. But they will thus only show that the notice was not displaced by circumstances, supposing that notice to be otherwise applicable to the plaintiff, and this will be their point of difficulty. These notices, to be valid, must be reasonable. The company has no power to impose unreasonable conditions upon passengers, and the judge of the county court has held this condition to be unreasonable, and he is supported by authority in so holding. In an action brought against the Great Eastern Railway Company for delay in starting a train, the defense was that the company by notice affixed to their time-tables declared that "they would not hold themselves responsible for delay, or any consequences arising therefrom." The plaintiff, a miller at Framlingham, held a season ticket, and was accustomed to travel to London by the defendants' railway to attend the Mark Lane corn market. He came one day

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to the station at the usual time; the carriages were ready, but the engine had not steam up and could not go. Mr. Baron Martin, who tried the case, made short work with the notice limiting liability. "It is," he said, "mere nonsense for the defendants to say, as in effect they say, 'We will be guilty of any negligence we think fit, and will not be responsible.'" It will be observed that in that case the notice was general that the company would not be responsible for delay, unless caused by the willful misconduct of their servants. It may be argued, therefore, that the ruling of Mr. Baron Martin in the former case is not an authority for the decision in the latter. There can, however, we think, be little doubt that the notice given by the Great Western Company is invalid. They say that they will only be responsible for willful misconduct, and, as there may be culpable negligence, which is not willful misconduct they say in effect that they will not be responsible for such culpable negligence, whereas it is clear that they must be liable.

But it is a different question whether, under the circumstances of this particular case, the defendants' claim to be discharged from their ordinary duty of keeping time would be reasonable, irrespective of any notice which they may have given. It will of course be conceded that a literal and absolute performance of the undertaking contained in their time-tables could not be exacted from them. Their duty is, as stated by the judge of the Reading county court, "to use all reasonable means to convey passengers to their destinations in the reasonable times which they have expressly fixed." The question, therefore, is, whether they used "all reasonable means" in the present case. It may be allowed that the case is not so strong against the company as that which came before Mr. Baron Martin. "Here," said he, "a train is advertised, the plaintiff gets to the station, and finds the train there and the engine without steam up—the horse in the stable unharnessed." It was stated in that case that an hour and a half was needed to get steam up. In the present case the want of porters at the Reading station caused a delay of only nine minutes, which caused the plaintiff to miss the train at Twyford. There have been judges on the bench who have leaned strongly against extending the liability of railway companies and it is not impossible that such a judge might view this case differently from the judge of the county court. If the case came before a jury, they might probably consider that unnecessary delay at Reading was combined with unnecessary punctuality at Twyford. If the train must wait at Reading because the porters were engaged, it might be thought that the train could wait at Twyford until the train from Reading had arrived. Assuming that the trains on the branch line to Henley are under the control of the defendants, they surely ought to have so managed as to protect the plaintiff from the consequences of delay caused, as was admitted, by the imperfection of their own arrangements at Reading. We think that the view which a jury would be likely to take of the case was fairly expressed by the judge of the county court when he said: "It is clear that the absence of porters at the Reading station, which reasonable care might have prevented, occasioned the detention of the plaintiff at Twyford, and as he was able to procure a conveyance by which he got to Henley half an hour sooner than the railway company were prepared to convey him by the next train, I think that he was justified in hiring it, and that he is entitled to recover its cost against the defendants."

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In another recent case a decision involving the same principle was given in the Burnley county court against the Lancashire and Yorkshire Railway Company. In that case the judge held that, although the company do not guarantee the arrival and departure of the trains at the times stated, and do not hold themselves accountable for any injury which may arise from delay, and "make such terms part of the contract with the passenger," yet they are bound to use all ordinary means within their power to perform their contract; and if they omit to use such means and show no sufficient reason for the omission, they fail to perform the duty which the law imposes upon them of using reasonable care and diligence in conveying the passenger to his destination according to their contract with him. The plaintiff in that case took a ticket at Burnley for Barnsley. The train by which he started ought to have reached Wakefield in time for a train starting from that place for Barnsley. But the train from Burnley to Wakefield was accidentally delayed, and the train started from Wakefield for Barnsley before the plaintiff arrived at Wakefield. It appeared, however, that the plaintiff and other passengers from Burnley arrived at Wakefield soon after the departure of the train for Barnsley, and if the station-master at Wakefield had known that they were coming he would have detained the train for them. An accident had occurred soon after leaving Burnley which rendered it impossible for the passengers from Burnley to reach Wakefield at the usual time. Afterward an arrangement was made for forwarding these passengers to Wakefield, and if, when this arrangement was made, the station-master at Wakefield had been informed of it, he would have detained the train starting for Barnsley until the Burnley passengers arrived at Wakefield. The judge of the county court held that the railway company were guilty of negligence in not sending this information by telegraph to Wakefield. As a train for Barnsley had left Wakefield before the plaintiff arrived there, he had to wait several hours for the next train, and thus he arrived at Barnsley too late to do his business, and had to go there on another day, and incurred expense which he now recovered against the railway company.

In one of the few reported cases of this kind that have been brought before judges of the superior courts, the plaintiff proved only that it was Whitsun Monday, and the train by which he traveled, being heavy, was late, and he missed an appointment. The late Mr. Justice Crompton held that, without some evidence of negligence the plaintiff could not recover against the company. Among the recent cases in which judges of county courts have decided against railway companies, the best known is that of Mr. Forsyth, M. P. This was a stronger case of delay than that which has given occasion to these remarks, as indeed the judge of the Reading county court, who decided both cases, admitted.

It may not be amiss to observe the light which this dissension throws upon the utility or necessity of that accumulation of reports of cases which is often treated as a reproach to the English law. We have been trying to ascertain what view judges are likely to take of complaints against railway companies of delay in carrying passengers. There has been a growing disposition to entertain such complaints, and in order to measure this growth we collect as many cases of this class as we can readily find, and compare their features. In order

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to do this we have recourse to the various legal periodicals which report select cases from the county courts and rulings of judges of the superior courts sitting at *nisi prius*. All this, be it observed, lies beyond the regular reports of cases in the superior courts, of which the bulk is sufficiently alarming. The truth is that the liability of railway companies in these cases is being established and defined, and while this process is going on it is necessary to note every word that falls from the judges who are concerned in what is virtually law-making. It seems, therefore, that not only law reports, but also legal periodicals are inevitable, although cumbrous, parts of our legal system.—*Saturday Review*.

THE 53d NEW HAMPSHIRE—Hon. JOHN M. SHIRLEY, Reporter.

The 53d volume of the New Hampshire Reports, will be out in a very short time. This volume will be one of the most important volumes of the New Hampshire Reports. While it will contain only about forty cases, making a volume of about 670 pages, the cases are of very great importance to the profession. We select the following head-notes:

PARTNERSHIP.

1. An agreement by which a person is to have a share of the profits of a business is competent evidence on the question of his liability as a partner in that business; but sharing profits in any other sense than sharing them as a principal, is not an absolute legal test of his liability. *Eastman* v. *Clark*, 376.
2. The question of his liability is the question whether he is a principal, bound by a contract made by himself or his agent, acting by his authorlty, or whether he is estopped to deny that he is a principal within the general doctrine of estoppel. *Ib.*

SPIRITUOUS LIQUORS.

Under chapter 3, section 3, of the laws of 1870, trespass for an assault and battery may be maintained against four persons who separately sold intoxicating liquors to one B, in violation of law, to recover damage occasioned by an injury to the person of the plaintiff, done by B, while in a state of intoxication by the liquor so furnished to him. *Bodge* v. *Hughes*, 614

SUBSCRIPTION.

Where a subscription is made upon several distinct and separate conditions, these conditions must all be performed before the subscription can be collected. *Porter* v. *Raymond*, 519.

TOWN.

The health officers of a town have no authority to make a town liable for medicines and medical services furnished to inhabitants who are not paupers. *McIntire* v. *Pembroke*, 462.

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RECENT ENGLISH DIVORCE CASES.

In *Grossi* v. *Grossi*, 7 Moak, 350, the court refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the court. Whether the court can, in any case, grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery. *Query*.

In *Green* v. *Green*, 7 Moak, 353, it is held, that a woman who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during co-habitation.

In *H*. v. *P*., (falsely called H's,) 7 Moak, 357, it was held, that in a suit of nullity, it appeared from the husband's evidence that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, and that although he had co-habited with her for more than three years the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband, the judge ordinary made a decree *nisi*, to annul the marriage under the provisions of the statute. 36 Vict., c. 31.

NOTES OF CASES.

MEASURE OF DAMAGES IN ACTIONS OF TORT, SUBJECT TO CRIMINAL JURISDICTION.

In *Taber* v. *Hutson*, 5 Indiana, 322, it was held, that where a defendant is sued in tort, which is also a subject of criminal jurisdiction, the rule that gives damages not only to recompense the sufferer, but to punish the offender, is not applicable. The damages for such a tort are compensatory. In *Fay and Wife* v. *Parker*, 53 N. H., 342, this question was most elaborately considered, and all the authorities reviewed. The court holding, that in a civil action founded upon a tort punishable by the criminal law, an amount of damages equal to the full compensation of the plaintiff for the injury sustained by him, cannot be increased by the addition of a fine for the punishment of the defendant.

BOOK NOTICE.

Catalogue of Reliable Attorneys.

We have received from the Hon. J. F. Frueauff, of Columbia, Lancaster county, Pennsylvania, his Catalogue of Attorneys, containing the address of a lawyer or law firm in every county in the United States. The price of this Catalogue is one dollar. We believe from our examination of this Catalogue that great care and prudence has been exercised in its preparation. We are personally acquainted with a large number of the attorneys in the West, whose names appear in this Catalogue, and if the attorneys in the South and East, compare favorably with the names of the western attorneys, Mr. Frueauff has performed a work that will prove a great convenience to the profession.

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GARNISHMENT.

A, being indebted to B, in the sum of three hundred dollars, is sued in the county court, and judgment is obtained for the above amount in favor of B. B orders an execution issued, which is returned *nulla bona*, by the proper officer. B, then makes affidavit, and files it with the clerk of the county court, where the judgment was rendered, that defendant A, has no property within the knowledge of B subject to execution; and that affiant has just reason to believe that C is indebted to A, or that he has effects or estate of A in his possession. C is summoned to answer as garnishee. C appears in answer to such summons, and answers that he is indebted to A in the sum of six hundred dollars. Query? Does the answer of C, that he is indebted to the execution defendant in an amount exceeding the jurisdiction of the county court, oust the court of its jurisdiction in the garnishee proceeding?

In the case of *Stahl et al.* v. *Webster et al.*, 11 Ills., page 511, the supreme court fixed the rule of practice in relation to the form of the judgment against a garnishee. The court say: "The practice has been to enter the judgment against the garnishee in favor of the attaching creditor, and yet there is manifest impropriety in entering a judgment, as in this case, in favor of the attaching creditor for a greater amount than he has recover-

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ed against the defendant in the attachment. How such a result is to be sometimes avoided, if the judgment against a garnishee is to be in favor of the creditor, whose attachment has been served upon him we do not well see. The proper practice would therefore seem to be, to enter the judgment against the garnishee in favor of the defendant in the attachment, for the benefit of such attaching and judgment creditors as are entitled to share in its proceeds. They would then have a right to control the judgment, and the money, when collected from the garnishee, would be liable to be distributed among the several creditors according to the directions received from the clerk. By entering the judgment in favor of the defendant in the attachment, the objections which have been suggested in giving practical effect to the provisions of the twenty-sixth section are obviated. Nor is any violence done to any other part of the attachment act by rendering the judgment in this form. The statute declares that it shall be lawful to enter up judgment and award execution against a garnishee, but does not specify in whose favor the judgment shall be. There is a peculiar fitness in entering the judgment in favor of the party with whom the debt was contracted, and to whom it is due, and if the judgment exceeds what is due the attaching and judgment creditors, the balance will be for his benefit."

Before this decision was made the practice had been to render the judgment against the garnishee in favor of the attaching or judgment creditor. The supreme court changed this rule in order to carry out the provisions of section twenty-six of the attachment act then in force, which provided in substance that where several attachments issued against the same person, returnable to the same term of court, or when judgment upon ordinary process should be entered against a person at the same term at which he was attached in another proceeding, that all such judgment and attaching creditors should share *pro rata* in the proceeds of the property attached. The same provisions will be found in section thirty-seven of our present attachment act. Rev. Stat. 1874, page 158.

In the case under discussion, Webster & Co. were the attachment debtors, F. & A. Stahl, brought an attachment pro-

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ceeding, and Strachen and Scott another. William and James Moir, brought suit without attachment, to the same return term. James Carter was the garnishee in both attachment proceedings, who acknowledged an indebtedness of eighteen hundred and thirty-six dollars and eighty-six cents, putting in the same answer in both cases. Judgment was rendered in both attachment cases, and also in Moir's case, and Moir asked to share *pro rata* with the attachment plaintiffs in the money in the hands of the garnishee. F. & A. Stahl's judgment against Webster & Co. was for something over fourteen hundred dollars, and yet they recovered judgment against the garnishee in their own name under the old rule for more than eighteen hundred dollars. The court say upon this point: "What authority, it may be asked, had the court to enter a judgment against a garnishee in favor of F. & A. Stahl, for a greater amount than they had recovered against the defendant in the attachment? It was done no doubt so as to be able to collect from the garnishee the whole amount he was owing, that it might be apportioned between the different attaching creditors."

Here were two attaching and one judgment creditor, seeking to share in this money under section twenty-six, and all entitled to share in it, and yet one attaching creditor, with a claim much less than the amount in the hands of the garnishee, had recovered judgment for the whole amount, which was four hundred dollars more than his judgment against the debtor. It will be further observed that the three judgments against Webster & Co., and upon which it was sought to reach the money in Carter's hands, amounted to much more than the amount in his hands, so that there was no surplus remaining after the distribution was made. Now, under these circumstances the court sought to make a rule which would avoid the absurdity of rendering judgment in favor of a party for more than was due him, and at the same time to so render the judgment as to hold the whole sum in the hands of the garnishee, not for the benefit of any one creditor, but for the benefit of all entitled to share in it. As it was, F. & A. Stahl had control of the entire sum in the hands of the garnishee, and by simply entering satisfaction of their judgment, on payment of the amount of their demand, the

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surplus of about four hundred dollars would be released, and they be paid in full. It would then fall into the hands of Strachan and Scott, who would upon a judgment of four thousand dollars get four hundred, and Moirs with a judgment of eight thousand would get nothing. To avoid this unequal distribution section twenty-six was made, and to give effect to that section, the court required the judgment to be rendered for the benefit of all who were entitled to share in the money in Carter's hands, and that it should be in the name of the party with whom the debt was contracted, or to whom the property belonged, and the court in changing the rule say: "All courts must have power to give effect to the orders that they are required to make and in giving a practical application to the provisions of the twenty-sixth section of the act under consideration, the courts must if necessary depart somewhat from the usual mode of proceeding in order to give effect to the law." I have reviewed this decision thus carefully in order to get at the causes which influenced the supreme court to change the rule of practice which had prevailed up to that time.

The next case on this subject is the case of *Gillilan* v. *Nixon*, for contribution. 26 Ills., 50. The facts were as follows: Dodd sued Gillilan & Nixon in the McHenry circuit court, and obtained judgment for something over five hundred dollars against Gillilan & Nixon. Execution was issued and a return of *nulla bona* made thereon. One Lester was then summoned as garnishee under the garnishment act, who was indebted to Nixon, and judgment was rendered against Lester for the full amount of the judgment against Nixon & Gillilan, in favor of Dodd, who was the judgment creditor. Nixon then sued Gillilan for contribution and obtained judgment. The supreme court in this case, without any question having been raised upon the form of the judgment in the garnishee proceeding, say: "As this proceeding against Lester was by garnishee process, and the judgment informally entered up, it may be well to say here, in accordance with an intimation of the court in the case of *Stahl et al.* v. *Webster et al.*, 11 Ills., 511, that the proper practice in such cases, is to enter the judgment against the garnishee in favor of the defendant in the attachment, as he is the real plaintiff, as against

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his own debtor. This judgment stands in favor of the debtor, for the benefit of such of his attaching and judgment creditors as may prove a right to share in its proceeds. Such creditors would then have a right to control the judgment, and the money, when collected from the garnishee, would be liable to be distributed among the several creditors. There is a peculiar fitness in entering the judgment in favor of the party who owns the debt, and to whom it is due, and if the judgment exceeds the claim of the attaching and judgment creditors, the overplus will be for his benefit."

In the above case, there were no attaching creditors, and only one judgment creditor. This was a proceeding under the garnishment act upon a judgment, and the only judgment creditor was Dodd, who recovered the amount of his judgment and no more. The court upon its own motion, criticise the form of the judgment, and place a proceeding in garnishment, upon judgment, upon the same footing as a garnishment in an attachment proceeding, so far as the application of this rule is concerned. And yet we may notice here, that the garnishment act contains no such provision for equitable distribution of property garnisheed, *pro rata* among several creditors seeking the same, as was provided for in the attachment act, in section twenty-six. That such a provision should be in the garnishment act is plain. As the law now is, in a garnishee proceeding after judgment, there could be no equitable distribution even if asked for; the law needs amendment in this particular.

Again in *Farrell, garnashee* v. *Peason et al.*, 26 Ills., 463, which was a proceeding in garnishment upon a judgment, the court upon their own motion criticise the form of the judgment and say: "The judgment should be entered in favor of the debtor who is the creditor of the party garnisheed."

In all three of the cases above referred to the judgment of the court below is affirmed, notwithstanding the criticisms upon the form of the judgment.

The case of *Rankin* v. *Simonds*, 27 Ills., 350, was a garnishment in an attachment case, and the supreme court again upon their own motion, criticise the form of the judgment, and after quoting again from 11 Ills., 511, they say: "Whatever

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judgment is finally rendered against the garnishee, should be entered up in favor of Elliot, (judgment debtor,) to the use of Simonds, (attaching creditor,) *or so much of it as is sufficient to satisfy his judgment against Elliot, and the balance, if any, to the use of Elliot himself.*"

Here it will be observed, the supreme court make a distinction which they did not make before. They direct the judgment to be for the benefit of the creditor, for an amount sufficient to satisfy his debts, and the balance *for the use of the judgment debtor himself.* In the former cases, the language of the court had been, that the surplus would be for his benefit, but they had not directed the judgment to be so entered.

In *Cariker* v. *Anderson*, 27 Ill., 358, the following language is made use of by the court:

"We must be permitted again to direct the manner in which proceedings should be carried on against a garnishee. A garnishee is in no proper sense a defendant in the suit of the plaintiff, and can not be called upon to defend against his claim, there is no privity between them. The *object and design* of the garnishee process, is to subject the debt he may owe the absent or absconding debtor, or his property in the hands of the garnishee, to the payment of the plaintiff's debt. The garnishee then, is the defendant to the suit the *law* institutes in favor of his ccreditor, the absent debtor, and he is the plaintiff in that suit."

Circuit courts are again admonished to follow this rule in 53d Ills., 168.

Now, in the case stated at the beginning of this discussion, if this rule is followed the judgment must be in favor of A for six hundred dollars, three hundred dollars of which shall be for the use of B, and the remainder for his own use. But this can not be, for the amount is beyond the jurisdiction of the county court.

The judgment creditor can not institute his proceeding anywhere else; for, by the first section of the garnishment act, the proceeding must be instituted where the original judgment was rendered. R. S., 1874, p. 450, sec. 1. Again the judgment creditor is not presumed to know the amount of the garnishee's indebtedness, to the judgment debtor, or the value of property

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in his hands, and the law fixes the place where he shall have these proceedings instituted; and shall it be said, that an answer of indebtedness in an amount above the jurisdiction of the court shall destroy the power of the party to reach the money or property in the hands of the garnishee? And yet, to carry out the rule laid down by the supreme court, and insisted upon by them, this result must follow. There is something wrong with this statute, requiring proceedings to be instituted in the court where the judgment was rendered, or there is something wrong with this rule of practice. Which is it?

I do not think that the garnishment act, or the attachment act, ever contemplated a judgment in favor of the attachment or judgment debtor for his own use in any amount; and the rule should be modified so as to limit the judgment against the garnishee to the amount of the funds or property in his hands, if such amount does not exceed the debts due the judgment or attaching creditors; but if the amount in the hands of the garnishee *does* exceed the amount of the debts due the judgment or attaching creditors, the judgment shall not exceed the amount of such debts. And, as to any money which the garnishee owes the judgment debtor, over and above the amount necessary to satisfy the debts of judgment and attaching creditors, it should not be adjusted in this garnishee proceeding. "The law compels the debtor to institute suit for the benefit of *his creditor* against the garnishee," not for his own benefit. "The *object and design* of the garnishee process, is to subject the debt he may owe the absent or absconding debtor, or his property in the hands of the garnishee to the payment of the *plaintiff's debt*," not to collect his own debt. The remedy should not be extended beyond its object and design.

"The garnishee is the defendant to the suit the *law* institutes in favor of the judgment debtor" against him, not to collect his own debt for his own benefit, but to collect enough to satisfy the debt he owes his judgment creditor, and when that is accomplished the whole design of the suit is accomplished, and it should be carried no further. By section sixteen of the garnishment act the effect of the judgment is declared to be, only to acquit the garnishee from all demands by the debtor, for so

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much as he is compelled to account for and pay over by force of such judgment." R. S., 1874, page 552, sec. 16. If the statute intended this suit to be a complete adjustment between the debtor and the garnishee, why not make it a complete bar to any other suit for the whole debt?

Again, the garnishee is compelled to answer as to all debts owing, whether due or not, and judgment may be had upon a debt not due. This extraordinary remedy is given to enable the judgment creditor to save his debt, but can it be said that it extends to the debtor, and enables him to get a judgment for his own benefit, against the garnishee for a debt not due, and thus acquire a lien upon the real property of the garnishee, before the contract upon which the judgment is rendered has matured into a cause of action?

Again, the judgment debtor, although in law, the plaintiff in the garnishee proceeding is not required to be notified, and is not actually present, and yet, under this rule, judgment is to be entered for his benefit, when he is not present and has no actual knowledge of the case which the law is carrying on in his name, for the benefit of his judgment creditor.

It is true, that the garnishee is permitted in his answer, to bring forward and deduct from the amount of his debt to the judgment debtor, any set-off which he may have against him, but this provision is made that the garnishee may not be compelled to account for more than he really owes, and the record must show the amount of set-off allowed him, so that the debtor may inquire into it, should he be dissatisfied with it; and section sixteen leaves the whole question open to future inquiry, excepting as to the amount paid by the garnishee. These considerations certainly lead to the conclusion, that the answer of the garnishee in the case first above given, does not oust the court's jurisdiction, but the judgment should be rendered in favor of B, for the use of A, against C for three hundred dollars, the amount of his debt, and the balance due to B from C, should be left for future adjustment between them. How would this rule work in the case of several creditors and an equitable distribution, as in the leading case, in 11 Ills., 511? Take the case already given. C has answered to an indebtedness of six hun-

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dred dollars to B, and B owes A three hundred. Suppose that D has also garnisheed C, and B owes him one hundred and fifty dollars, and E has done the same thing with the same indebtedness from B, and now they ask a distribution. Would the court render judgment against C, for six hundred dollars in favor of B, for the use of A, D and E. Not so, that would be beyond the jurisdiction of the court. But the court would regard each as a separate case against C, and render three separate judgments against C for the use of A, D and E, for their separate amounts ascertained to be due them. This would do no violence to any part of the attachment or garnishment law, and would give effect to the whole. There would be one judgment for B, for the use of A, for three hundred dollars; another for B, for the use of D, for one hundred and fifty dollars, and still a third for B, for the use of E, for one hundred and fifty dollars. But as before stated, the garnishment act does not at present provide for an equitable *pro rata* distribution of money in the hands of a garnishee. It would of course be done in the case above given, as there is money sufficient to pay all the debts, but in case it was not sufficient, it is a serious question, whether such an equitable distribution could be made as the law now is.

I would say in conclusion, that any rule of practice of long standing, which has had the repeated sanction of the supreme court is entitled to great respect; but rules of practice are only adopted to the end that the law may be administered; and when a rule is found to interfere with the administration of the law, it should at once be modified or changed to avoid the difficulty. And, as this is true in the case I present, I have ventured to make these suggestions against the rule as it now is, and in favor of its modification by the courts.

A. B. CAMPBELL.

CAUSES FOR CHALLENGE OF JUROR.

It is a good cause of challenge to a juror, that he is the tenant of one of the parties. *Harrisburg Bank* v. *Forster*, 8 Watt., 304. As to grounds of challenge of jurors at common law, see Blackstone's Com., book 3, p. 363; and for statutory causes for challenge, see Hurd's Stat. p. 633, § 14.

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AMENDMENTS IN ELECTION CASES.

EDITOR WESTERN JURIST:

The construction of our present statute concerning contested elections, being involved in several election cases now pending in the courts of this State, a discussion of some of the questions involved in these suits may be of immediate and practical importance, as well as of general interest to the legal profession at large. The questions discussed in this article arose upon motion made by contestant for leave to amend his petition, which is, perhaps, one as well calculated as any that could be made to draw out full consideration of the scope of the powers of our courts in election cases.

In considering this subject of the right to amend, the first point that suggests itself to the legal mind, relates to the powers of the court. Does the court act under its general common law, or chancery powers, or is it not, for the purposes of proceedings of this character, created by the election statute a special tribunal? Can it exercise powers not expressly conferred upon it in the act by which the jurisdiction is bestowed?

As a foundation of the argument on this point we will premise that judicial power does not inhere in the person of the court, but is derived from the law; and there are but three sources from whence such power can emanate, to-wit: the constitution, common law and statutes. These sources of power we will consider in the order stated.

By sec. 12, art. 6, of the constitution, it is provided, that "the circuit courts shall have original jurisdiction of all cases in law and in equity, and such appellate jurisdiction as is, or may be provided by law." Is a proceeding to contest an election, a "case in law, or in equity," within the meaning of this clause of the constitution? This point we regard as being settled by authority. The case of *Moore* v. *Mayfield*, 47 Ills., 170, was a proceeding to contest an election, originally tried by three justices of the peace under the old statute, appealed to the circuit court and again tried, and a writ of error sued out to the supreme court. The statute having made the decision of the

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circuit court, on appeal from the justices, final, a motion was made in the supreme court to dismiss the writ of error. This motion was resisted, on the ground that, the constitution of 1848 having conferred original jurisdiction on the supreme court in certain specified cases, and "appellate jurisdiction in *all other cases*", the statute making the decision of the circuit court final, was unconstitutional. *Per curiam*, "The proceeding to contest an election under our statute is not a case within the meaning of the section of the constitution cited. This is a mere statutory proceeding for re-canvassing the votes cast at an election, in which the illegal votes may be rejected, and those which are legal may be counted and the result ascertained, and the finding of that result is not a judgment in the sense in which that term is used in the law, giving the right to prosecute a writ of error, nor is the proceeding by means of which that result is reached a '*case*', within the meaning of the constitution. That term would refer more properly to an action at law, or a suit in chancery, but this proceeding is neither one nor the other."

To the same effect are, *The People ex rel., &c.* v. *Smith*, 51 Ill., 178; *Littlefield* v. *Green*, 1 Chicago Legal News, 147; *Lighty* v. *French*, 9 Ind., 475.

It follows from the doctrine of these cases that the jurisdiction and powers of the court, in these cases, are not derived from the constitution.

Are the courts, then, clothed with common law powers in these election cases? It would seem unnecessary to quote authorities, in addition to those already cited, to establish the negative of this question. We take it the supreme court meant just what the language we have quoted imports. The decision is concurred in by the whole court, and the language is repeated in the case of *The People* v. *Smith*, above cited.

We understand a "mere statutory proceeding" to be one created and wholly governed by act of the general assembly, one derived purely and only from the statute. What then, follows from the doctrine, that a proceeding to contest an election is a mere statutory proceeding, and not an action at law, or suit in chancery? One consequence, is, that the common law powers of the court can not be invoked to justify acts not pro-

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vided for by statute, the statute being the only source of the powers of the court. Another consequence is, that this proceeding does not come within the provisions of any general statute relative to judicial proceedings, except so far as the special statute creating the remedy may adopt and apply the provisions of the general law. For example, the statute of amendments and jeofails extends only to "actions in *courts of law or chancery*, to all suits for the recovery of any debt due the State, or for any duty, or revenue thereto belonging; to all actions for penalties or forfeitures, and to proceedings in *mandamus*, *quo warranto* and *scire facias*." This proceeding, which is *sui generis*, belongs to neither of the forms of proceeding embraced within the terms of that act. Neither can the provisions of the practice act, relative to amendments, be held to apply, because it extends only to "civil suits." Keeping in view the nature of this proceeding, as defined by the supreme court, we look in vain for any provision of any general statute which can be held to include it within its terms.

Has the transfer of the jurisdiction from a special tribunal to the courts, changed the nature of the proceeding? We are unable to perceive that any essential change, in respect to the substance of the remedy, has been made. A careful analysis of the old statute and the new, will show that the only changes that have been made relate simply to method and form, and not to the substance or essence of the remedy. These changes seem to have been intended to adapt the practice in these cases to the convenience of the courts. The notice, required under the old statute, answered all the purposes that the petition and summons both answer under the new act. It apprised the contestee of the "points" of contest, and in addition, designated one of the justices who would sit as a member of the special tribunal, and fixed the time and place of hearing. All these elements were essential in a proceeding before a special tribunal, convened for the purposes of a single trial, and having no time or place fixed by the general law for the transaction of its business. But all of them, except the statement of the "points" of contest, were rendered unnecessary when the jurisdiction was transferred to the courts, their time and place of holding sessions being fixed

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by law. A summons, made returnable to a regular term, now takes the place of all parts of the notice under the old law, except the statement of the points. Thus far, at least, there is no difference in effect between the old and the new statute. After such steps were taken as were necessary to acquire jurisdiction over the parties to the contest, the mode of proceeding was the same as under the present act. There was no provision in the old law, nor is there any in the new, requiring the defendant to answer, or directing how an issue shall be made up. Both are entirely silent on this point. The testimony on behalf of the contestant was confined to the points specified in the petition under the old law, and so it is in the new. The justices themselves heard the testimony, and it was required to be taken in the form of depositions. The same form is now observed, the only difference being, that they are not taken before the court. This departure in method was rendered necessary on account of the impracticability of a court, burdened with other duties, giving its attention to this matter. The trial before the justices was conducted in the same manner as in chancery, i. e., they heard and examined the evidence, and were required to decide which of the candidates was duly elected, and certify the same to the clerk of the county court, who was directed to deliver to the successful party a certificate of his election. Under the new law the case is to be tried as cases in chancery, which simply means that the court shall hear the evidence and pronounce its conclusion; and then it is declared, "a certified copy of the judgment shall have the same effect as to the result, as if it had been so declared by the canvassers."

From this comparison of the provisions of the two statutes, we fail to discover any difference whatever, in effect, between them. Not a single material change has heen made, except to give the jurisdiction to the courts, instead of to three justices of the peace. We are unable to understand upon what principle this transfer of jurisdiction should be held to work an entire change in the character of the proceeding. If the statute is the only source of the powers of the court, as it was the only source of the powers of the justices under the old statute, the mere transfer of these powers can in no way enlarge or amplify the

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jurisdiction. They are not, and can not be greater when exercised by a court, than when exercised by justices of the peace. It is a special jurisdiction, which would not exist if the statute had not created it, and, being created by the statute, it is thereby limited and controlled.

"The general jurisdiction of the circuit courts is over all matters and suits at common law and in chancery. When acting within the scope of its general powers, a circuit court is a court of general jurisdiction. * * * But when a superior court exercises special statutory powers, it stands upon the same footing and is governed by the same rules as courts of inferior jurisdiction." *Haywood* v. *Collins et al.*, 60 Ills., 328.

"In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed." *Thatcher* v. *Powell et al.*, 6 Wheat., 119.

"However high the authority may be where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute." *Christie* v. *Unwin*, 11 Adolph & Ellis, 373.

"This rule applies equally to an order of the Lord Chancellor, as to any order of the petty sessions." 3 Perry & Davidson, 208.

See also, *Morse* v. *Presby.*, 3 Foster, (N. H.), 302; *Crepps* v. *Durden*, 2 Smith's Lead Cases, 1011, and notes.

"In special proceedings, the court vested with jurisdiction by the statute, possesses only such powers as the act creating the special case has conferred, and in the exercise of those powers it is limited by the terms of the act. * * * The court looks to the statute alone for authority; and the question, whether in a given case, the court can exercise any power, or adopt any of the forms of procedure, common to courts of law, must be determined by the provisions of the statute conferring jurisdiction. * * * Since the decision in *Dickinson* v. *Van Horn*, 9 Cal., 207, the late supreme court have more accurately ascertained, and defined the character of the proceedings under the statute, relating to contested elections, and as already remarked, in the cases before cited, they held them to be special proceedings, and

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in one case denominated them 'summary proceedings.' We regard them in every sense as special proceedings, and subject to the well settled rule, that in adjudicating upon them, the tribunal exercising jurisdiction, *must resort to the statute alone to ascertain its powers and mode of procedure.*" *Dorsey* v. *Barry*, 24 Cal., 452.

Here we have the doctrine applied in an election case, and that too, in a case where the jurisdiction was given *to the courts.*

In the case of *Saunders* v. *Haynes*, 13 Cal., 152, the supreme court of California, commenting upon the same statute say: "This proceeding is not according to the course of the common law; it gives new rights and remedies. By the common law an election could not be contested by an elector. The government might by *quo warranto*, eject an intruder from office, but this it did by virtue of its sovereign power, and by a process analogous to a criminal proceeding. The statute of 1850, creates a special proceeding wholly distinct in form, and substantially different from this common law remedy."

The constitution of California, like ours, gave the district ςourts of that State, jurisdiction "in all cases of law and equity", where the amount in controversy exceeded two hundred dollars, nd it was insisted that by virtue of this provision the jurisdicon belonged to the district courts, and that the act conferring ch jurisdiction upon county courts was unconstitutional. But was held to be a "special proceeding", and not within the ms of the constitution.

The inevitable consequence of this doctrine is that the genechancery and common law powers of the circuit court can be involved in this proceeding. We have nothing to do with general powers of the court, or its general jurisdiction, and l look only to the terms of the statute, to ascertain the full nt of its authority. Acts strictly within the terms of the ute are valid; acts in any degree outside of statute are nuga. No act done by the circuit court can be justified, that d not be valid if performed by a special or inferior tri-l.

Another proof that the bestowment of this jurisdiction the courts was not designed to clothe them with chancery

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powers in the exercise of that jurisdiction, is that in, by far, the largest class of cases it is to be exercised by county courts. It will not be contended that county courts have general common law, or chancery powers. As a court of common law, its jurisdiction is limited and special, and it has no chancery jurisdiction whatever. Yet the manner of proceeding in election cases is the same when conducted before county courts, as when instituted in the circuit court. The fact that the manner of proceeding is in some particulars assimilated to proceedings in chancery, does not give the court general chancery powers. There would be just as much consistency and force in holding that, because the manner of proceeding is in some respects the same as in chancery, the act confers general common law and chancery powers upon county courts, as in saying that it confers such powers on circuit courts.

If authority be needed to establish the proposition, that courts of chancery have no jurisdiction to inquire into the validity of elections, it may be found in the case of *Moore* v. *Hoisington*, 31 Ills., 247. In that case the court, *per* Breese, Justice, say: "We find in some States by *express enactment* courts of chancery can inquire into the validity of elections by bill, but we have found no case in which it has taken jurisdiction of such a case *under its general powers*. Nor do we perceive a necessity for it, the general election laws of the State being sufficient to meet most cases, if not this very case. * * * If a case is not exactly met by the election law, we are disposed, rather than exercise a doubtful power, to consider this particular case as omitted from the operation of the general law, but not on that account conferring jurisdiction upon this court."

As we proceed we shall see that this election statute is singular and anamalous; that while the powers it confers are in some sense judicial and are given to the courts in the discharge of the duties imposed, the general powers of the courts are not to be exercised, but only those derived from the statute; and that the proceedings must be treated like those of a court of limited and special jurisdiction. It is true, as before remarked, that in certain particulars, a case under it is to proceed as in chancery, and aside from these particulars no rule of practice is

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established. In all other statutory proceedings, all the details of practice are provided for. As an example we refer to the statute providing a remedy for the enforcement of mechanics' liens. This statute, after providing that the proceeding shall be commenced by the filing of a petition, and what the petition shall set forth, regulates the manner in which the defendant shall be brought into court, gives him the right to answer and the plaintiff to file replication, and prescribes the method of trial. It then provides generally, that "the court shall permit amendments to any part of the pleadings, and may issue process and make all orders requiring the parties to appear, and requiring notices to be given that are, or may be authorized in proceedings in chancery, and shall have *the same power and jurisdiction over the parties and the subject, and the rules of practice and proceeding shall be the same in such cases, as in other cases in chancery, except as is otherwise provided in this act.*"

The same is true of the proceeding by administrators to sell land to pay debts. The statute provides for all the details of practice, and that "the petition may be amended, heard, or continued for notice, or for other cause, and that the *practice* in such cases shall be the same as in chancery." Yet how often has it been decided that this statute does not confer chancery powers? See *Bennett* v. *Whitman*, 22 Ills., 449; *Bursen et al.* v. *Goodspeed*, 60 Ills., 277; *Cutter* v. *Thompson*, 51 Ills., 390; *Phelps* v. *Funkhouser*, 39 Ills., 401.

So the partition act provides, "amendments shall be allowed as in cases in chancery," and, until the amendment of the statute in 1861, which, in express terms, clothed the courts with chancery powers, it was uniformly held that the court, in partition proceedings, could not exercise such powers.

Again, in the attachment act, which is a statutory proceeding, express provision is made for the exercise of the power of amendment.

We may now ask, in view of the fact that the legislature have deemed it necessary to make express provision for the exercise of this power in all causes in law and in equity, and in all special statutory proceedings except this, is not the fact that they have not conferred the right in this proceeding, a conclu-

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sive argument that such right does not exist? Is it not to be presumed that some sufficient reason induced the general assembly to withhold this power? May it not be that the exercise of such a power was deemed incompatible with the spirit and policy of the law?

Sec. 113 of the act under discussion requires the contestant to file with the clerk of the proper court, within thirty days after the result of the election is declared, a statement in writing, setting forth the points of contest. This section operates as a limitation upon the right of any person to inaugurate a contest after the lapse of the time specified. If amendments are permitted, a door is thrown open whereby this section of the law may be evaded and rendered wholly nugatory. The "points", upon which an election may be contested, are quite numerous. An election may be void because it has not been held at the time and place fixed by law, or because it has not been held by proper officers, or for want of proper notice; because of the ineligibility of the successful candidate, and for many other causes.

Again, the election may have been valid and the returns of the canvassers erroneous. The return might fraudulently falsify the aggregate number of votes, or be founded on mathematical error ignorantly, or intentionally committed. Or the judge of election may commit errors, or frauds in the reception, or rejection of votes; and, when no error, or fraud can be imputed to the officers of election, the return may be false in consequence of being founded on frauds, or impositions practiced by the electors. A return may be invalid from the operation and effect of a single cause, or from the conjoint operation and effect of many causes. In a single county the certificate of the canvassers is based upon the returns of a dozen, or more, different sets of officers; and in district and State elections the number is greatly multiplied. Now what we understand, when the statute says that the contestant shall file a statement in writing, setting forth the points on which he will contest the election, is that he shall state the grounds, or facts on which he bases his complaint. In other words, he must say *why* he complains. It is a perversion of language to assert, as is contended, that the "point" of a contest, as regarded by this statute, is, "Who is elected?" The

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rule repeatedly laid down by the court, by which to test the sufficiency of complaints of this character, is that it is the duty of a party complaining against the election, or return of an officer, to set forth the *facts* on which the complaint is founded, clearly and distinctly, and that, to induce the court to proceed to the consideration of such a complaint, the facts as stated should exhibit a case which, if sustained by proof, would render it the duty of the court to either entirely vacate the election, or declare that another person than the party returned, was elected. *Skerrett's case*, 1 Pars., 509.

It has as repeatedly been decided that mere general averments that the party returned as elected was not elected, and that the returns are untrue, false, or fraudulent, without stating facts specifically, are not sufficient. The rule that the averments must be specific and narrate facts, has been recognized by our supreme court in *Prettyman* v. *Board of Supervisors*, 19 Ills., 413. The consequence of holding that the "point" of the contest is, "Who is elected?" would be that the contestant might file a statement, alleging the holding of an election and that the canvassers declared his competitor elected when in fact he was not, and afterwards he could amend *ad libitum*, setting up any matter which in his opinion had any bearing upon the point (?) involved in a denial of his petition. Such is not the meaning of this section of the statute. The "points" required to be set forth are the *facts* which constitute the grounds of complaint, and these facts must be such as would, if proved, justify the court in ousting the incumbent of the office.. It is not the design of this statute, where a contest is inaugurated, for instance, upon the ground that the judges of election erred, by reason of ignorance of the law, in the rejection of votes which they should have returned and counted, to allow the contestant, after the lapse of the period of limitation and the filing of the defendant's answer, to amend his complaint, and assert that the defendant was not elected because ballots cast by persons not entitled to vote were returned and counted in his favor. This we hold to be setting up an entirely new and different cause of action, so to speak, from that originally stated. It is an entirely different "point" from that on which the contest was begun.

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The mistakes of the officers of election constitute one point, it is true, but fraud and imposition practiced by the electors is another and very different point. And while, as before remarked, an election may be invalid from the conjoint operation and effect of many causes, yet where several distinct grounds are relied on for the purpose of setting aside the return, we think it was the manifest intention of the law to require all such grounds to be clearly stated in the original petition.

In the case of the *I. C. R. R. Co.* v. *Cobb, Christie & Co.*, decided at the June term, 1872, of our supreme court, the question of the right to amend by adding new counts, setting up causes of action concerning which the period of limitation had expired, between the time of filing the declaration and the term of court at which the amendment was allowed, was decided adversely to the right of amendment. The court say: "Counsel for appellees cite various authorities to show that courts should be liberal in allowing amendments for the purpose of avoiding the running of the statute. These authorities, however, are cases where the amendment was for the purpose of re-stating the cause of action in the pending suit, and not for the purpose of introducing a wholly different cause of action. The rule contended for by appellees would substantially break down the protection intended to be given by the statute." This case is a good illustration of the principle that the discretion which courts are said to possess with respect to amendments, does not enable them to do away with the provisions of a statute. The court held the plea of the statute of limitations to be a good defense to the new counts.

The construction we have placed upon this statute, we believe to be in harmony with the spirit and policy of our election law. Why was the period of limitation, with respect to this proceeding made so short, while the time given within which to enforce merely private rights is much more extended? It is to be presumed our law makers had some special purpose in view, in thus discriminating between this and the ordinary remedies.

The object of all limitation statutes is to protect individuals and the public against injustice, which would frequently result from loss of evidence, death, removal, or failure of memory

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of witnesses, and other accidents consequent upon the efflux of time. They are designed to quiet and make stable and secure the title to property, and give repose to individuals and society in the enjoyment of their rights and privileges. These reasons apply with greater force where the interests of the public are cencerned, and where the title to office rests upon the tenure of popular elections. The evidence by which illegal votes may be proven, is speedily lost sight of and forgotten after an election is over. Such votes are generally cast by transient men in reference to whose qualifications, aside from a short stay in the election district, nothing is known to the general public. They are exceedingly difficult to prove, and, unless ferreted out at once, cannot be established at all.

Again, it is against the policy of the law to permit public officers to be harassed and annoyed with expensive, vexatious, never-ending lawsuits, calculated to absorb their whole time and attention in a continual struggle for official existence, and to divert their minds from the duties they owe to the public. And there is also another wrong which the statute is designed to guard against. If, after a person declared elected has entered upon the duties of his office, and spent months in the public service, thereby incurring liability for its emoluments, he may be deprived of his position without compensation for time spent and services rendered in behalf of the public, the statute, instead of affording protection, serves but to ensnare and delude. And the same is true, if a contest may be inaugurated within the statutory period upon a single point and the petition amended after the lapse of months, and the incumbent ousted upon grounds of which he had no previous notice, or knowledge. To permit a contestant thus to conceal facts within his knowledge, which it is his duty to disclose in the outset of the contest, and afterward, to avail himself of the fraud thus perpetrated, is to pervert the plain meaning of a statute and thwart its purposes.

Where no statute of limitations intervened, our supreme court refused to interfere with an election alleged to have been carried by fraud, because the application was not made in apt time. They say that while a certificate of election may undoubtedly be impeached for fraud, upon establishing a proper

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case in apt time, justice and reason alike prohibit a party from impeaching the election, after acquiescing until liabilities are incurred, credits given and subscriptions made on the faith of the return. "If fraud existed, the party must have known it, and should have proceeded at once to enjoin proceedings, but having delayed for near four months, the presumption is that rights have been acquired and liabilities incurred, that would make it inequitable for the court to interfere, although fraud in the election may have existed." *Prettyman* v. *Supervisors*, 19 Ills., 414.

And in the case of *Mayfield* v. *Moore*, 53 Ills., 433, where it was decided that the emoluments of the office might be recovered by the successful contestant, one ground upon which the right of recovery was placed, was that notice of contest, specifically setting forth the basis of the contestant's claim, was promptly given after the result of the election was declared, thus apprising the contestee of sources of information concerning his title, and enabling him to inquire into the facts and act upon them, if he chose to do so. This statute is founded upon like reasons of policy and justice. It is its manifest purpose to require that elections shall not be impeached, or set aside, unless the party complaining acts promptly, in making known all the grounds of his complaint. This feature, like many other features of our election statute, is mandatory and imperative, and can not be disregarded by courts, or contestant. W. C. H.

Supreme Court of Illinois.

GEORGE M. HADDEN et al. v. OSCAR B. KNICKERBOCKER et al.

APPEAL FROM COURT OF COMMON PLEAS, OF AURORA.

The record in this case presents the direct question, whether the landlord has a lien upon the property, other than growing crops, of the tenant after it is removed from the demised premises, which he can enforce against *bona fide* purchasers.

Held, that no specific lien is created or given on property other than growing crops of the tenant, and that when property has been removed from the demised premises prior to the levy of the distress warrant, and sold to *bona fide* purchasers for value, such purchasers will take the title to such property. But if the sale is fraudulent the rule would be otherwise.

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The opinion of the court was delivered by

SCOTT, J.—The facts of this case may be briefly stated, Dudley Randall was a tenant of appellant, Hadden, and was in arrear for rent of premises occupied by him. The landlord issued his warrant and placed it in the hands of Graves to be executed. After the warrant was issued, but before it was levied, the appellees claim to have purchased the property in controversy of Randall, for a pre-existing indebtedness, and to have taken the same into their possession. It is conceded, the property was in possession of appellees when the levy was made under the distress warrant. It was taken out of their possession, and this suit was commenced, in replevin to recover it. While there is some conflict in the evidence, the jury were justified in finding, that appellees were *bona fide* purchasers of the property involved in this litigation. The jury also found by special verdict, that neither of the appellees at the time of the alleged transfer of the property had notice that Randall owed Hadden for rent, or that he was about *to* distrain for the same. The record presents the direct question, whether the landlord had a lien upon the property after it had been removed from the demised premises which he could enforce against *bona fide* purchasers. At common law a distress for rent had to be made upon the demised premises, and the right of the landlord to distrain terminated with the removal of the goods. If any remedy remain it was by action. Even the goods of a stranger if found upon the demised premises might be seized. In this respect the common law has been enlarged and modified by the provisions of our statute; by our laws the landlord may distrain the goods of the tenant anywhere the same may be found in the county where the demised premises are situated, but not the goods of a stranger, although found on the premises. This provision of the statute, however, has exclusive reference to the property of the tenant. Laws enlarging the common law remedy, by distress, have always been construed strictly. Hence this statute can not be so construed as to authorize the landlord to distrain property in the hands of a stranger, although he may have purchased it of the tenant. The lien of the landlord was superior to all junior liens, so long as the property remained upon the

premises occupied by the tenant, but could not prevail against prior liens, or over the rights of *bona fide* purchasers, after the property had been removed. We do not understand our statute has changed the common law in this respect, or given the landlord any greater or different lien except in the case of crops growing on the premises. A lien is expressly given the landlord by statute, upon crops growing, or grown upon the demised premises in any year, for the rent that shall accrue during the current year. (R. S. 1845, p. 335, sec. 8). But no specific lien is created or given as to other property of the tenant. In the case at bar the property purchased had been removed from the demised premises, prior to the levy of the distress warrant. Appellees were *bona fide* purchasers for a valuable consideration. Their right to hold the property is not effected, by the fact they may have known that rent was due the lessor, and that he was about to distrain. The property had been sold and removed by the consent of the tenant, and the right to distrain did not exist either at common law or by any provisions of our statute. If the transaction had been fraudulent, it seems the landlord might follow the property, but not otherwise. Taylor, on Land and Tenant, sec. 576. In *Batch* v *Meats*, 5 Maule & Selw., 200, it was held, a creditor may with the assent of his debtor take possession of goods and remove them from the premises for the purpose of satisfying a *bona fide* debt, without incurring the penalty of the statute. 11 Geo. 2, c. 19, sec. 3, against persons assisting the tenant in removing his goods from the premises, and this notwithstanding his knowledge that rent was due and an apprehension the landlord was about to distrain. The same principle was recognized in *Martin* v. *Blick*, 9 Paige, 641, and in *Coles* v. *Marquan*, 2 Hill, 447. In *Hastings* v. *Belknap*, 1 Denio, 190, it was declared where a tenant assigns his goods to provide for the payment of *bona fide* debts, and the goods are removed from the demised premises the right to distrain is at an end, although the creditors had notice that rent was about to become due. See also, Taylor on Land and Tenant, 577. The case of *O'Hara* v. *Jones*, 46 Ill., 288, cited by counsel for appellant with so much confidence, can clearly be distinguished from the case at bar. There the goods were assigned to pay the debts

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of the tenant, and had not been removed from the demised premises prior to the distress. It was held, and very properly, the assignee was a trustee, and not a *bona fide* purchaser. Not being such he took the property under the assignment and held it subject to all the burdens it was under in the hands of the assignor. The assignee was himself, for the time being, a tenant of the premises. The same doctrine is announced in *Martin* v. *Black*, *supra*.

No material error is perceived in the instructions given for appellees. Those asked on behalf of the appellants do not state the law correctly. Hence they were properly refused. For the reasons indicated, the judgment is affirmed.

JUDGMENT AFFIRMED.

Supreme Court of Illinois.

C. K. DAVIS *v.* F. M. PICKETT.

Judicial sale—mere inadequacy of price is not ground for setting aside sheriff's sale. But there must be other grounds connected with inadequacy of price to warrant the interference of a court of equity—agreement to convey—statute of frauds—mistake—redemption.

C. K. Davis, pro. se.

A. C. Duff, for defendant.

The opinion of the court was delivered by

WALKER, C. J.—The bill in this case alleges, that at the April term, 1871, of the Saline circuit court, Martha J. Gaston, recovered a judgment in that court against plaintiff in error, for the sum of $138.14 and for $10.80 costs of suit. That on the 29th day of the following May an execution was issued and placed in the hands of the sheriff; who, on the 12th day of the next June, levied on the S. W. of the N. E. qr. Sec. 32, T. 7 S., R. 5 E., which he offered for sale on the 14th of the next July, when F. M. Pickett became the purchaser for $5.00, and received a certificate of purchase.

On the 26th of the same month, the sheriff levied the same

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execution on the S. E. qr. Sec. 30, T. 10 S., R. 6 E., and on the 3d day of the succeeding August, sold the same to H. H. Haines, for $2.50, and gave him a certificate of purchase. That the forty acre tract was worth $300, and the quarter section $2,000 to $3,000. That there was more cost incurred in making these levies and sale by $12.60, than was realized by the sales. That another execution was levied on two town lots in the town of Harrisburg, which were worth $75 each, and these lots were sold by the sheriff for $2.00 to F. M. Pickett. That some time in the month of August, 1872, plaintiff in error attempted to and supposed he had paid off all liabilities which were encumbrances upon his property; but he had lost sight of the sale of the forty acre tract, and did not discover the mistake until about the 14th day of January, 1873, when the time for redemption had expired.

That immediately upon the discovery of the mistake, plaintiff in error applied to Pickett, to be permitted to redeem the forty acre tract from the sale, by paying him the amount bid, and ten per cent. interest from the day of sale, when Pickett expressed himself as entirely willing for the redemption to be made. Plaintiff in error thereupon prepared a certificate of redemption and caused the same to be presented to him, with a tender of the $5.00 with ten per cent. interest thereon from the day of sale to that time. That Pickett refused to accept the redemption money and to sign the certificate of redemption, and informed plaintiff in error that he had taken from the sheriff a deed for the land. That plaintiff in error then tendered the redemption money and costs of a conveyance, and requested him to convey the lands to plaintiff in error, but this he refused to do. The amount for which the lands were sold was merely nominal, and was inadequate and insufficient to support the sale for such nominal sum, and that the sale for such nominal sum was fraudulent and void for want of consideration. He charges on belief, the sale of the land for the nominal sum, was the result of a fraudulent combination and confederation between the sheriff and Pickett, to wrong, oppress and defraud plaintiff in error. The bill concludes with a prayer that the sale be set aside, and Pickett be required to convey to plaintiff in error.

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To this bill defendant in error filed a demurrer, which was sustained by the court, and the bill was dismissed. To reverse that decree the record is brought to this court on error.

This court has repeatedly said that mere inadequacy of price at a sheriff's sale, is not grounds for setting it aside. But there must be other grounds connected with the inadequacy of price, to warrant the interference of a court of equity. *Ayers* v. *Baumgarton*, 15 Ill., 444; *Mixen* v. *Sibley*, 53 Ill., 61.

In this latter case, it was said: "We do not think mere inadequacy of price, great as it may have been, would be sufficient of itself to set aside a sale in any case where the right of redemption is given, unless there are some indications of fraudulent practice, or some advantage against the debtor not warranted by law." That case seems to be decisive of this. It is the latest determination of this court and it must control.

Here was a sale, the regularity of which is not questioned, by a sheriff under a judgment and execution, entirely regular, made after due notice at the time and place specified as we may infer, as nothing is charged to the contrary; a regular bid was made when the land was offered, and it was struck off to the purchaser. The bid is perhaps extremely small, still it was a legal bid and the best that was offered, and the sheriff was bound to accept it and strike the land off at the bid or adjourn the sale, and that was in his discretion. There is nothing shown from which any unfairness can be inferred. A certificate of purchase was executed to the purchaser, and he permits the matter to slumber for eighteen months, before he takes any steps to relieve himself from the sale. He gives no excuse, but simply says he had lost sight of the sale. Not even that he had never known of the sale, but simply he had forgotten the matter, leaving us to infer that he was so indifferent to his interests and affairs that should concern him, that he even did not charge his memory with the transaction.

The amount was small, and he could certainly have paid it and redeemed the land without much inconvenience or sacrifice. The time was ample and nothing but his careless inattention to the matter prevented him from redeeming. We look in vain in the bill to find that anything wrong or illegal was done by the

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sheriff or purchaser at or since the sale. If loss ensues, he, and he alone, is responsible for the result.

Nor does the bill allege a sufficient agreement by defendant in error, to permit a redemption when called upon for the purpose, leaving the question of the statute of frauds out of view, the allegation does not show an agreement. The allegation is, that defendant expressed himself as entirely willing for such a redemption to be made, not that he agreed that it might be made, or that such was the contract between them. Defendant then held the legal title, and a redemption could not be made under the statute, and if any redemption could be had it would have been by contract between the parties, and on such terms as might be agreed upon by them.

The mere charge that plaintiff in error believed and charged that there was a fraudulent combination and confederation between the officer and purchaser is not sufficient. Such a charge should be based on facts disclosed in the bill, tending to implicate them in such practices, is necessary to require an answer. Hence this does not aid the bill in its want of a charge of fraudulent practices.

We are unable to see any equitable grounds of relief disclosed by the bill, and the court below committed no error in sustaining the demurrer, and the decree must be affirmed.

DECREE AFFIRMED.

In the Circuit Court of the United States,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

WARRENER v. THE COUNTY OF KANKAKEE.

1. The suit was brought to recover on eight coupons for $100 each, issued by the county of Kankakee, for interest maturing July, 1873 and 1874, on railroad bonds issued by Kankakee county to aid in the construction of the Kankakee and Illinois River Railroad.

2. The defense interposed was in substance, that after the county had voted the bonds in aid of the railroad, but before actual delivery, the company had consolidated its stock and franchises with the stock of a railroad corporation in Indiana, known as the Plymouth, Kankakee and Pacific Railroad Company, and that said consolidation was invalid because it was not assented to in

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writing, by all the stockholders of the Company resident in the State of Illinois, and also because the Kankakee and Illinois River Railroad Company had no road constructed or in process of construction at the time said Kankakee and Pacific Railroad Company was chartered. *Held*, that the county could not set up this defense in its own behalf, in the manner it had attempted to do, for the reason that it had allowed the consolidation in some form to take effect, and had allowed the consolidated company to put the bonds in circulation.

3. The right of the company to consolidate under its charter is limited, but that did not take away the right from the company to consolidate under the general law of the State, by complying with all the requirements of the law.

The opinion of the court was delivered by

BLODGETT, J.—The suit was brought to recover on eight coupons for $100 each, issued by the county of Kankakee, for interest maturing July, 1873 and 1874, on railroad bonds, Nos. 10, 11, 12 and 13, issued by Kankakee county, to aid in the construction of the Kankakee and Illinois River Railroad. The bonds purported, on their face, to be in aid of the Company, pursuant of the act of the legislature of this State to enable cities, towns or communities, to issue what are commonly known as "railroad-aid bonds."

The defense interposed was in substance that, after the county had voted the bonds in aid of the railroads, but before actual delivery, the Company had consolidated its stock and franchises with the stock of a railroad corporation in Indiana, known as the Plymouth, Kankakee and Pacific Railroad Company; that said consolidation was invalid, because it was not assented to in writing, by all the stockholders of the Company resident in the State of Illinois, and also because the Kankakee and Illinois River Railroad Company had no road constructed or in process of construction at the time said Kankakee and Pacific Railroad Company was chartered.

The court held that the defendant could not, collaterally, question the validity of the consolidation in the present suit. If it were illegal or irregular, it could only be inquired into by suit in the nature of a *quo warranto* properly brought by a stockholder for that purpose, and that it did not lie in the mouth of the defendant to question or avoid its liability for its bonds or contracts by attacking the consolidation indirectly. It appeared, from all the pleadings and admitted facts in the case, that there

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were some objects of the consolidation accomplished; that the consolidated Company had, in fact, succeeded to, and in some manner exercised, the rights and franchises and used the property of the original roads from which it was composed. In other words, it became a corporation *de facto*, and used the franchises and powers which it claimed to exercise, and while so doing contracts made with it, and rights derived through it would be enforced without inquiring into the regularity of the consolidation itself. It also appeared that the consolidation was made under the general law of this State, and that there was no irregularity or want of compliance with the provisions of the law, except in the failure to obtain the consent of all the stockholders. It was not claimed that the county of Kankakee itself, the defendant, did not consent, but that all the stockholders did not consent. The county could not set up this defense in its own behalf in the manner it had attempted to do, for it had lain by and allowed the consolidation in some form to take effect, and had allowed the consolidated Company to put the bonds in circulation. The bonds had been purchased in the market, and value paid for them, and they were at present, as far as the record showed, held by *bona fide* holders, who should be protected.

The right of the Company to consolidate, under its charter, seemed limited, but that did not take away the right from the Company to consolidate under the general law of the State by complying with all the provisions of the law, except the one named, which could not be made available in the present case. The demurrer to the rebutter was therefore sustained.

TOWNSHIP BONDS.

The officers of several of the townships of Illinois have endeavored to prevent the collection of railroad-aid bonds by resigning after judgment was rendered. The holders of the bonds have been considerably interested to know how they could collect the amounts of their judgments, when this trick was resorted to. The question has been decided by Judge Blodgett, in a recent proceeding to compel officers of the town of Amboy, Lee

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county, in this State, to audit and report to the proper officers of the county of Lee certain judgments recovered by Bolles & Co., against the town of Amboy. In his opinion the judge says:

"The township organization law provides for the contingency of resignation by the various town officers, and provides for a method by which the vacancies caused by these resignations shall be filled. It also provides that persons who are elected and qualified to any town office shall hold their offices until their successors are elected, or appointed, and qualified. It does not appear from this return that any successor has been appointed to Mr. Badger, who was the supervisor of this town, nor to any of the justices who resigned, nor to any of those town officers, who resigned their offices, as is evident, for the purpose of avoiding the auditing of the plaintiffs' judgments. If they had, in addition to the allegation of their own resignation, alleged that their successors had been duly qualified and accepted the offices, they would of course have shown that they were no longer responsible, as the principle clearly deducible from the township organization law, as it now stands in this State, is that when once a town officer is elected, and accepts the office and qualifies, he remains such officer until his successor is appointed, either by election or by appointment. Until his successor is appointed and qualified and is ready to take possession, he is such officer. Mr. Badger and these other officers, according to their own returns made in this case, were duly elected the supervisors of this town; they acted as such; they qualified as such, and continued to act up to the time that they found they were obliged to either audit these judgments of the plaintiffs' or resign, and they resigned to avoid, evidently, the auditing of the plaintiffs' judgments. It was an expedient resorted to by these town officers, evidently to avoid the levying of taxes and to enable the property owners of this town to escape the payment of taxes that might be levied to liquidate the plaintiffs' demands. Now the question is, have they evaded it by their resignations? I think they have not. I think that these men, being still town officers of this town—their places not having been filled—they are still bound to proceed and audit these claims. The mandamus will therefore go, requiring these respondents to audit these judg-

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ments at the regular meeting of the auditing board on the Tuesday preceding the annual town meeting in April next. The demurrer to the answer will be sustained, and an order made for a peremptory writ of mandamus."—*Chicago R'y Rev.*

State of Illinois.

JOHN HOCHLAND *v.* EVA HOCHLAND.

BILL FOR DIVORCE.—*Error to Circuit Court of Cook County.*

Opinion by WALKER, C. J.

The opinion in the above named case is a recent one and of much importance to the profession in several particulars.

It announces what a return to process should contain, and what should be the substance of a jurat; and that each should be definite and certain.

It appears that the return to the process was in these words: "Served by reading to and leaving a copy with the within named John Hochland, this 8th day of May, 1872," and was properly signed by the officer. The service having been by a special deputy, he was required to swear to his return. The jurat was as follows: "Subscribed and sworn to before me this 11th day of May, 1872. NORMAN T. GASSETT, Clerk."

The return of service is about as vague and indefinite as it could be made. It was not shown *what* was read, nor *to whom* it was read; of what a copy was delivered, nor that it was a true copy. The jurat is in the usual slipshod form. It neither states who subscribed and swore, nor to what. It simply appears that *somebody* did subscribe and swear to *something*, on the day named. Who did it and to what he subscribed and swore, are left wholly to conjecture.

There was another difficulty with the case. The summons was dated May 8th, 1872, and was returnable to the third Monday of *next* May, more than a year from its date, though the May term of the court, for the year 1872, commenced twelve days after the date of the summons. The court had no jurisdiction. The writ was void and the decree was void. The par-

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ties were not divorced, though the decree so pronounced them to be.

Now supposing the wife, who, in good faith believed herself divorced, had married again before the decree of the circuit court had been reversed; what, under such a state of facts is the legal state of the woman?

In New York, the second marriage, by statute is voidable —not void—and the remedy of the first husband is, by bill to annul the voidable marriage. The children of such voidable marriage are legitimate. *Valleau* v. *Valleau*, 6 Paige, 207; *Cropsey* v. *McKinnon*, 30 Barb., 47. At common law however, we apprehend a second marriage, under such circumstances, is void absolutely, and the party incurs the misfortune of an unlawful connection. 2 Kent's Com., p. 80.

Such is undoubtedly the law in the State of Illinois. *Reeves* v. *Reeves*, 54 Ill., 332. W. M. H.

Supreme Court of Illinois.

MALCOLM v. ANDREWS.

NE EXEAT—WHEN PETITION FOR MUST ALLEGF FRAUD.

Held, that in a proceeding by *ne exeat*, not of an equitable nature, the plaintiff in analogy to the proceeding by *capias ad respondendum* must show by his petition; by facts stated and circumstances detailed, that the debtor has been guilty of fraud, or that there is a strong presumption of fraud.—*Legal News*.

D. C. Jones, for plaintiff in error.

John B. Kagy and *B. B. Smith*, for defendant in error.

The opinion of the court was delivered by

McAllister, J.—The petition or bill in this cause was brought against the maker of two promissory notes, before their maturity, upon which a *ne exeat* was issued, and plaintiff in error arrested and required to give special bail. The only groud for such arrest set forth in the petition was the complainant's statement, upon information and belief, that since the making of the notes plaintiff in error had sold out the greater part of

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his property and was endeavoring to sell the remainder; had threatened to leave the State of Illinois, and had said he would not pay said notes. It is not alleged he had any property which was not exempt from execution, or that the acts done or threatened were with the intent to defraud complainant or any other creditor. Unless he had property which was not exempt from execution, the mere fact of the sale of property, even with the view of remaining out of the State, would not of itself raise a presumption of fraud, and in the light of the facts set up in his answer, showing that the notes were obtained from him by fraud, a declaration on his part that he would not pay them might be prompted by a sense of justice rather than a design to defraud customers.

But we need not stop to discuss the sufficiency of the petition, for it is obvious from the record that the case was disposed of in the court below, upon the theory that the element of fraud on the part of the plaintiff in error was wholly immaterial. The petition, by not waiving it, calls for an answer under oath. An answer under oath was filed, in which the defendant expressly denied having sold his property, or being about to remove from the State, for the purpose of defrauding the complainant or any other person, or of defeating the collection of the notes held by the complainant.

No replication was filed, but exceptions to the answer, based upon the ground of immateriality of the matters of the answer. An answer upon oath being called for, and one filed, which denied all purposes of fraud, and to which there was no replication, the defendant's counsel made a motion to quash the writ of *ne exeat.* This the defendants, by the seventh section of the statute, was justified in doing. The court could then be properly called upon to determine whether the writ ought not to be quashed or set aside. If fraud was a necessary element for the support of the writ, it there being admitted by excepting to the answer for immateriality, that there was no fraud, it would follow that the writ ought to be quashed. But the court overruled the motion to quash, ruled out the entire answer upon the exceptions, and rendered judgment against plaintiff in error for the amount of the notes with interest.

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The question fairly presented by this record, therefore, is, whether the holder of a promissory note can lawfully maintain this proceeding against the maker before the maturity of the note, for the purpose of having him arrested upon the process of the court, and if he fail to put in special bail, committed to the common jail as upon a *capias ad respondendum*, and this wholly irrespective of any fraud on the part of the debtor proceeded against.

The twelfth section of Art. 2 of the Constitution declares: "No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is a strong presumption of fraud."

This provision in the same language has been incorporated in the Bill of Rights, contained in the constitution of this State, from its first organization. In *Burnap* v. *Marsh et al.*, 13 Ill., 535, which was an action on the case for maliciously and without probable cause suing out a writ of *ne exeat* against Burnap, and causing his arrest thereon. The court said: "It must be remembered that, under our Constitution, no person can be legally imprisoned for debt alone; and it is only in cases where the debtor is fraudulently or wrongfully endeavoring to evade the payment of his debt, that he can be restrained of his liberty. The imprisonment there is not for debt, strictly speaking, but for his wrongful act in endeavoring to evade its payment."

Again, in *Strode* v. *Broadwell*, 36 Ill., 419, the court quoting the above, say: "Thus it is seen that the imprisonment is for the wrong or the fraud rather than for the debt." These citations show, that according to the views of this court, the provision of the Constitution under consideration is to be regarded as having effectually abolished imprisonment for debt, as practiced under the common law, and that where a debt is the basis of the action, in order to justify imprisonment, the foundation must be laid under one or both of the exceptions contained in section 12, viz: a refusal to deliver up his estate for the benefit of creditors, or fraud either in contracting or evading payment of the debt.

In the first of the two cases above referred to, the doctrine

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was enunciated in a case where the arrest was made upon a *ne exeat*, and it was in reference to that arrest the court was speaking. If any distinction could be made between such a case, where the basis of the proceeding was of legal cognizance, and the processes at common law, such a distinction would have been attempted and made by the able judge who delivered the opinion of the court in that case.

But we are unable to perceive how, without resorting to refinements and subtleties not justifiable in the application of constitutional principles, any distinction can be made; for, in the case in hand, the right for which protection was sought, was such merely as grew out of the relation of maker and holder of negotiable instruments. In *Parker* v. *Follansbee*, 54 Ill., 478, the court, after quoting the section of the Constitution abolishing imprisonment for debt, said: "It has been repeatedly held by this court, that any liability to pay money growing out of contract, express or implied, constitutes a debt, within the meaning of the provisions of the Constitution; and that before a party can be held to bail on a *capias ad respondendum* it must appear by affidavit that he has been guilty of fraud, or that there is a strong presumption of fraud."

We are therefore constrained to hold, that, in a case like this, not of an equitable nature, the plaintiff, in analogy to the proceeding by *capias ad respondendum* must show by his petition, by facts stated and circumstances detailed, that the debtor has been guilty of fraud, or that there is a strong presumption of fraud. *Ex parte Smith*, 16 Ill., 347; *Gorton* v. *Frizzel*, 20 Ill., 291.

By a petition or bill properly framed the issue of fraud is necessarily tendered, and if made by the respondent's answer, it is necessarily a material issue, which, if established in favor of the respondent, would be ground for quashing the writ.

It follows from these views, that the court below erred in overruling the motion to quash the writ, and its judgment will be reversed.

REVERSED.

The writ of *ne exeat*, at common law, only issued in cases based upon claims of a purely equitable nature, or in cases where law and equity jurisdic-

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tion was concurrent. Such as cases of account or for arrears of alimony actually due. It was one of the ordinary processes of courts of equity, and was regarded as much a writ of right, as any other process used in the administration of justice. Its effect was to hold a party, amenable to justice, and to render him personally responsible for the performance of the orders and decrees of the court, by preventing him from withdrawing from its jurisdiction. It was proper only for the purpose of detaining the person of the defendant to respond to the decree of the court. If the necessity for the writ existed at the commencement of the proceeding, it was evoked by petition, setting out a clear right to relief in equity, and that the defendant was about to sell or dispose of all his effects and leave the realm, thus making it necessary, in order to enforce the decree, that the defendant should be detained. The petition was verified by affidavit. The writ then issued, and its purpose was to obtain equitable bail, and when such bail was given the defendant was released. The demand must have been actually due, or the writ could not properly issue, and it must have appeared in the petition that the debt was actually due or the writ was quashed. The petition was required also, to set out the facts, upon which the petitioner founded his belief, that the defendant was going to quit the realm. The writ could issue at any stage of the proceedings, and when applied for after the bill was filed, was based on motion supported by an affidavit of the necessary facts above set out. It was originally a high prerogative writ, which was only granted in clear cases, and was handled with great caution. Subject to this jealous watchfulness however, the writ was always granted when a proper case was made, and it was deemed necessary in order to secure the enforcement of the decree of the court. A man could not be twice arrested upon the same matter, so that if a defendant was once arrested and discharged for any cause, he could not be again proceeded against by this summary remedy. The element of fraud did not enter into this writ. It was not required to be alleged or proved against a defendant, in order to evoke or sustain the writ. It was not regarded in the light of imprisonment for debt, but was a power given to courts of equity to enable them to enforce and render effectual their decrees. It was to keep the party within the jurisdiction of the court, until he should comply with its orders if he was able to do so. It did not rest upon any statutory authority, but was one of the necessary and inherent powers of the court. For a full discussion of the origin, nature and purposes of this writ, as it existed in England, see 4th Vesey, Jr. Reports, vol. 1, page 95; vol. 4, page 577; vol. 8, page 593, and authorities there cited. That the writ has been recognized and granted in this country, on the authority of the above authorities, see 2d Paige Ch. R., page 617; 1st Paige Ch. R., page 629; 2d Sanford Ch. R., page 626; 10th Barbour S. C. R., page 46; 50 New Hampshire R., page 353; 23 Wisconsin R., page 483; *Gilbert* v. *Colt*, 1 Hopkins Chy., 496. The English idea, that a writ of *ne exeat* is a prerogative writ, is inapplicable here. This writ has now become an ordinary process of courts of equity, and it is as much a writ of right as any other process used in the administration of justice, and in cases of a purely equitable nature, it must be granted when a proper case is pre-

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sented. The statute of Illinois, R.S., p. 717, sec. 1, has extended this writ so as to embrace demands of a legal nature, and to allow the writ to issue, whether the debt be due or not. The application of the writ, therefore, to demands of a legal nature, rests entirely upon statutory authority, and the supreme court of Illinois in the case of *Malcolm* v. *Andrews*, has held, that before the writ can issue upon a legal demand, the writ must show that the debtor has been guilty of fraud, or that there is a strong presumption of fraud; applying the constitutional prohibition, against imprisonment for debt, to this statutory class of cases. But the court is careful to distinguish between legal and equitable demands, and the profession should be careful to note this distinction.

In the case of *Forrest* v. *Forrest*, 10 Barbour, page 46, the supreme court of New York, after a careful discussion of this writ, held, that it was not done away with by the code of New York; but was a remedy, still existing, independent of statutory enactment, on the principle that it was necessary to the due exercise of a court of chancery's peculiar and exclusive jurisdiction, and to prevent a failure of justice.

In the case of *Dean* v. *Smith*, 23 Wisconsin, page 483, the court use this language, going to the point under discussion:

"The constitution certainly declares, that no person shall be imprisoned for debt arising out of, or founded on a contract, either express or implied. But we think a writ of *ne exeat* is not imprisonment for debt within the intent and spirit of this provision of the constitution. It is said by the authorities to be in the nature of equitable bail, and issued only by the special order of the court, when the party against whom it is asked, is about to leave the jurisdiction of the court," (citing authorities,) "and this, as it appears to us, is the true nature and character of the writ of *ne exeat*. It prevents a person from going out of the State until he shall give security for his appearance, and is not imprisonment for debt within the proper meaning and sense of those words, and unless the writ is prohibited by that clause of our State constitution, which forbids imprisonment for debt, arising upon contract, the circuit courts have the power of requiring this kind of bail in cases which are of equitable cognizance, where the defendant is about to elude the justice of the court, by removing beyond its jurisdiction. We have already stated that we did not think the constitution abolished the writ."

While therefore the constitutional prohibition relating to imprisonment for debt, is applied by the supreme court, to the writ of *ne exeat*, where it issues on a legal demand. It does not apply to the power of the court to issue the writ in cases of an equitable character.

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Supreme Court of Pennsylvania.

In the matter of the Contested Election of FURMAN SHEPPARD, Esq., to the office of District Attorney.

The court of quarter sessions has a right to amend its record in a public contested election case, even after the case has gone to the supreme court and been remitted to the quarter sessions.

Certiorari at the instance of Charles Gibbons, Esq., to the decree of the court of quarter sessions of the city and county of Philadelphia.

James E. Gowen and *R. C. McMurtrie, Esqs.*, for Gibbons.

George W. Biddle, Esq. and *Hon. Benj. Harris Brewster*, for Sheppard.

Opinion by AGNEW, C. J., February 1, 1875.

The application to this case of the principles governing the controversies between individuals who are affected by their own acts, is a source of error. Analogical reasoning misleads, when true analogy is wanting. The proper character of this case must be stated in order to determine it correctly. It was a contested election, a proceeding to redress a public wrong. Under the Act of 3d May, 1859, contested elections for district attorney are to be decided in the manner provided for contesting the election of county officers: 1 Brightly, 490. The Act of 2d July, 1839, gives jurisdiction to the courts of quarter sessions, to "*hear and determine*" all cases in which the election of any county or township officer may be contested: 1 Brightly, 572. The proceeding is on the petition of at least twenty qualified voters, complaining of an undue election or a false return. The petition in this case will be found in 15 P. F. Smith, 22. It sets forth various frauds and illegal practices, alleged to be done with intent to hold an undue election, and to prevent an honest expression of the popular will at the election. In the opinion on page 29, it is said: "The contest of an election is a remedy given to the people by petition for redress, when their suffrages have been thwarted by fraud or mistake. The instituted tribunal is the court of common pleas or quarter sessions as the case may

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be. By the Acts of July, 1839, and February 3, 1854, the court is to proceed upon the *merits* of the complaint, and determine *finally* concerning the same according to the laws of this Commonwealth. No bill of exception is given to its decisions, nor appeal allowed, and its decisions are final. Consequently the supreme court has no jurisdiction over the subject."

The supreme court thus having no power to review the merits, it can only, under its general power to supervise the proceedings of inferior tribunals, bring up the record for this special purpose. The power to correct errors in the judgment in this case belongs to the quarter sessions alone. To it is the cause of the people committed, and it alone can determine whether popular will has been defeated by fraud or unjust practices.

Now it is evident that when this court brought up the record of the quarter sessions by certiorari, it was for no purpose of correcting the findings or decree, and when it affirmed that finding or decree, it did not confirm it on the merits for the plain reason it had no power to inquire into them. It simply affirmed that the quarter sessions had proceeded in due course of law. The duty of determining who was the legally elected district attorney demanded a truthful and faithful performance of this function, by the only lawful tribunal, and if it made a mistake by which the will of the people was actually falsified, instead of being ascertained as the law required, this very duty demanded that the court should correct its own mistake in due time.

It is well settled that elections of the people should not be defeated by mere informality, and hence the law declared that the court "should proceed upon the *merits* of the complaint." This being the peculiar province of the quarter sessions, it refused to correct its own palpable mistakes of calculation, which defeated the popular will, it would violate the very spirit and intent of the law which required it to ascertain the *merits*. Now what were the mistakes the court below had made? It had, by mere accident omitted to credit Mr. Sheppard with thirty-six votes of naturalized citizens which it had allowed to be legal. It had also made the mistake of deducting the *purged* votes from the majority of Mr. Sheppard, instead of deducting them from the

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whole poll before the majority was struck. Correcting these errors of calculation, Mr. Sheppard was actually elected as well as returned.

The duty of correction is admitted, but it is said it must be done while the record is in the breast of the court, and therefore before the end of the term. This is the conceded rule, but does it apply to this case? Clearly not: It is a case of suspended power only. The application was made during the term, and while the record was yet in the breast of the court, and capable of correction. The court was advised of its mistakes, and entertained the application by receiving and permitting it to be filed. But its hands were then tied, its power to act suspended by the mandate of a superior court, to send up its record for alleged errors of procedure. It then could proceed no further, without disrespect to the superior tribunal. Here was the clear distinction. It was but an involuntary suspension of its undoubted power, not an extinguishment. The cause was not removed by an appeal which *ended* its inquiry into the merits. The superior court acquired no jurisdiction over the merits, and therefore its writ could not deprive the inferior court of its rightful power to correct its own mistakes. For the same reason the decree of the superior court, which it is said ratified and affirmed the false finding of the inferior court, did not affirm its falsehood. It could neither inquire into the merits of the petition for the correction of mistakes nor strike them off, because they were received and filed in time. There was, therefore, but a suspension of the power of correction in the quarter sessions, which was *resumed* when its record was returned. The term had passed only in point of time, not of judicial cognizance. It was not an attempt to correct an error of judgment after it had passed finally into the record. It was no re-judgment of the merits, when judgment had gone by. Such attempts are clearly illegal, as shown in the case of the *Commonwealth* v. *Maloy*, 7 P. F. Smith, 29, and the error was not saved in that case by the illegal custom of entering immediately a rule to show cause why the sentence should not be modified or set aside. Under such a practice, no judgment could ever be final. But when a rightful petition for the correction of a mistake, is received, on what

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principle of sound reasoning does the removal of the record by a higher authority for another and a rightful purpose, merge the pending petition forever, and drive justice from her seat? It is only by false reasoning and ill fitting analogies, such a conclusion can be reached. It is said the suspension was Mr. Sheppard's own act, and he is estopped. True, it was his act, and it was his right also. He believed the proceeding which unseated him to be irregular. He failed, but his mistake did not oust the right of the people to have their own officer elected by them. Their right to have the merits of the election truthfully declared by the court was not barred by the suspension, caused by his writ, from an appeal to the only tribunal having power to correct the mistake; they were not estopped by his act. The power of the court, though first moved by his petition, was not arrested in its motion because he failed. The court itself, as the chosen tribunal of the people, was bound to correct its errors when made known to them in any way. It is a false analogy to say he elected his remedy, and therefore the court cannot exercise its inherent power to do right. It is a false analogy to say that the public redress is to be determined by rules applicable only to a private controversy. It is a false analogy to liken this case to the attempt of a court to rejudge its judgment after the term was passed. This was no such attempt. Here was a manifest mistake of calculation shown by the notes of the judge.

As remarked by C. J. Lewis, there is a great difference between revising a judgment and correcting a clerical mistake in entering it: *Smith* v. *Hood*, 1 Casey, 220. "It is doubtless true, (remarks Judge Kennedy,) that after the end of the term, in which the court has rendered judgment upon a case, stated on a general or special verdict from which an appeal may be taken by writ of error, or otherwise, it cannot alter or change it with a view to correct what the court upon further reflection may consider an error therein, and yet it would be going too far to say that such court may not afterwards and before any proceeding has been had upon the judgment, correct a mere mistake that has arisen in entering it differently from what was intended and perhaps directed:" *Stephens* v. *Cowan*, 6 Watts, 513. And said Judge Tilghman, one of the safest of judges: "But

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although it had been during the term, it would not follow that the court had exceeded its power, for amendments have been allowed, not only after the term, but even after error brought:" *Ordweaver* v. *Purdy*, 6 S. & R., 511. The same excellent judge said also, in *Bailey* v. *Musgrove*, 2 S. & R. 220: "Where the object of the amendment is to do justice, courts are vested with extensive powers, not only by statute, but by the common law."

Judge Yates remarked in the same case: "The strictness which formerly obtained in the granting of amendments, is said in our books, to be almost entirely eradicated." Still later, Chief Justice Gibson has said, "Not only has every court the power, but it is its duty to amend a clerical error, which stands in the way of justice:" *Owen* v. *Simpson*, 3 Watts, 88.

The whole system of amendments is but an exercise of the power of correction to reach substantial justice. It is the everyday practice of this court to disregard formal errors or mistakes that do no injustice. The end is the same, that justice be not put to shame by her own ministers. The books are full of corrections, and the legislature has expanded the power from time to time.

Names may be altered, parties added or struck out, the forms of action may be changed, two judgments may stand where only one stood before, the bar of death is removed from estates in joint contracts, and in some torts. Even the traditional sacredness of criminal procedure has been invaded by the legislative command, and indictments may be amended in certain respects which before were forbidden. And it may well be asked, why should not those be trusted to correct their own mere mistakes, who are entrusted with the greater power to decide the merits?

This beneficial power may be illustrated by a few cases found in the books. Eight years after judgment, and after the defendant's death, the court permitted the record to be amended by entering judgment *nunc pro tunc: Murray* v. *Cooper*, 6 S. & R., 126. In *Ordweaver* v. *Purdy*, *supra*, a plaintiff was permitted to amend his declaration after judgment by altering the time of the assumption. See also, *Baily* v. *Musgrove*, *supra*. In *Stephens* v. *Cowan*, 6 Watts, 511, Judge Young, after the court rose

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in Indiana county, by letter from Ebensburg, stating that he had entered judgment by mistake for the plaintiff, directed the prothonotary to "set the error right by entering judgment for defendants." On error this was maintained. After a lapse of forty years the court permited a *ven. exp.* to be amended to include an executory devise levied on, but not recited in the *ven. exp.*: *De Haas* v. *Brown*, 2 Barr, 335. On the trial of an ejectment under sheriff's deed, an amendment of the *ven. exp.* was permitted, by inserting the name of a defendant from the præcipe, and the sheriff's sale thus passed the title: *Seckler* v. *Overton*, 3 Barr, 325. A judgment entered by mistake upon a warrant of attorney, for a less amount than the obligation called for, was amended after execution executed, and an alias awarded to collect the balance: *Smith* v. *Wood & Co.*, *supra.* An omission in a *levari facias* of the command to levy the debt, was permitted after a sheriff's sale, and on writ of error the amendment was held to be good: *Peddle* v. *Hollingshead*, 9 S. & R., 277. A writ of *fi. fa.* on which land was levied and sold, was in its entire body made out in a different case, and only the indorsement was right, and it was held to be amendable, and the title passed: *Owen* v. *Sampson*, *supra.* In *Fitzgerald* v. *Stewart*, 3 P. F. Smith, 343, a verdict for damages in slander was rendered for plaintiff and a motion for a new trial and in arrest of judgment entered. The plaintiff afterward died, and her death was suggested, and a rule was entered to show cause why the writ and action should not abate. After several terms the rules were discharged and a judgment entered *nunc pro tunc* as of the term of the verdict when the plaintiff was alive. This action of the court was sustained. Thus when the plaintiff's right of recovery was actually gone, in point of time, the power of the court was exerted through the legal fiction of a *nunc pro tunc* to prevent a failure of the verdict. In *Ullery* v. *Clark*, 6 Harris, 148, we have an illustration of the difference between the correction of a mistake and an alteration of the judgment itself. The language of Judge Kennedy, in *Stephens* v. *Cowan*, was adopted, and it was held that a judgment without costs could not, two years afterwards, be corrected to stand as a judgment with costs. The question of costs was one of right and the

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court could not correct its error of judgment by a subsequent order. This is the true distinction. But a court powerless to correct its mere mistake of calculation, or the misprisions of its officer would be stripped of half its power to perform its true functions.

Upon the whole, we can discover in this record no excessive exercise of power by the court below, which demands correction, especially at this late day, when the term of office has expired and the people have no contest and no cause for redress.

The proceedings are therefore affirmed.—*Leg. Int.*

We publish in this number an article ante page 538, written by a distinguished lawyer of this State, on the subject of amendments in contested election *cases*. The foregoing opinion of the supreme court of Pennsylvania, holding that the court of quarter sessions has a right to amend a record in a public contested election case, even after the case has gone to the supreme court and been remitted to the quarter session, illustrates the question of the power of the court hearing the case to amend its records, in order to make the record conform to the facts; but while this power to amend exists in the court it does not necessarily follow that the parties can amend the papers so as to change the case and present new issues.

GUARDIAN AND WARD.

A guardian under the statute of the State, has not the custody of the lands of his ward, as a guardian in common socage has. The guardian has authority to demand and sue in his own name, as guardian for the personal property and demands due his ward, but can not bring a suit in relation to the real estate, except in the name of the wards. In the case of *Muller* v. *Benner*, supreme court of Illinois, Sept. term, 1874, the court, *per* Scott, J., say: "A guardian in socage, has the custody of the land of the infant, and for that reason may lease it avow in his own name, and bring trespass or ejectment in his own name.

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Hugh Miner's Appeal, 53 Penn. St. Rep. 500; 2 Kent's Com. 228; *Holmes* v. *Sealy*, 17 Wend. 75.

But we do not think a guardian under the provisions of our statutes can exercise any such power. It is apprehended when a general guardian has been appointed under our laws, with a defined statutory control over the estate of the wards, there can be no such relation as guardian in socage. No power is conferred by our laws upon a guardian, over the real estate of his ward except to lease the same, "upon such terms and for such length of time as the county court shall approve." He is not given any interest in the lands as a guardian in socage had at common law; and by no express words is he given, nor by any fair intendment can it be held he is entitled to the possession.

Our statute has not made it the duty of a guardian to take possession of the real estate of his ward, nor has it given the right to bring actions in relation thereto as a guardian in socage at common law.

He has authority to demand and sue in his own name as guardian for all personal property and demands due the ward, but no power is given to bring suits in relation to real estate. Upon this authority, it is clear that in Illinois the guardian can not maintain an action of ejectment nor trespass to the real estate of his ward, but must bring the suit in the name of the ward. The guardian may appear to prosecute and defend for his wards in all legal suits where the land of his wards are in controvery, but it must be in the name of his wards. In *Minor's Appeal*, 53 Penn. St. 500, the supreme court of that State held, that a guardian in that State has no control of his ward's real estate, except what relates to leasing it and receiving the rents and profits, and that it is his duty to lease the land, and that he is bound to keep the real and personal estate safely, and to account for the personal estate, and the rents and profits of the real estate. The guardian must be held to the same care and management that a prudent man would exercise in his own affairs, he must act for his ward and not for himself. In the case of *McElheney* v. *Musick*, 63 Ill., 328, the court hold, that when a guardian, with a view of preserving an estate unimpaired until

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the heirs become of age, leases for a less sum than could be obtained from ordinary yearly rents, first securing the approval of the probate court, and acts in manifest good faith, he is not liable for having failed to secure the higher rent. By the common law the guardian was required to take possession of his ward's property, and he was not only liable for such property as actually come into his possession, but for such as he might have taken possession of by the exercise of diligence and without any wilful default on his part. So in regard to the rents and profits of the ward's lands and tenements, and the income from every species of his property the guardian was chargeable with what he actually received, and with what he might have received, had he faithfully discharged his duty. The cases here may be considered as modifying in a slight degree the common law rule of the liabilities of guardians. See also, *Bond* v. *Lockwood*, 33 Ill., 212.

CODE PRACTICE TRESPASS-CASE.

In *Howell* v. *Graves et. al.*, 27 Arkansas, 365, it was held, that where the action in its nature under the code of practice resembles the form of an action under the old system of practice, the law for the introduction of evidence and the giving of instructions to the jury under the old system, will ordinarily be observed. The court say: "The complaint must he framed with precise reference to the specific remedy invoked as prescribed in section 101, *Code of Civil Practice*, *Smith* v. *Knapp*, 30 N. Y., where an action in its nature under our code system of practice resembles any *form* of an action under the old system of practice, the law for the introduction of evidence, and proper to be given in instructions to the jury under the latter system, will ordinarily be observed in the former, though the code abolishes all forms of action but one." By the statute of Illinois, § 22, p. 777, Hurd's Stat., it is provided that, "The distinction between the actions of 'trespass' and 'trespass on the case,' are hereby abolished, and in all cases where trespass or trespass on the case, has been heretofore the appropriate form of action, either of said forms may be used as the party bringing the action

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may elect." While this statute allows the party to elect as to which form of action he will elect to bring it, does not in any manner change the law as to the admissibility or introduction of the evidence, nor the form of the pleading, nor the law to be given to the jury, by way of instructions from the court. Under the authority of *Smith* v. *Knapp*, 30 N. Y., 581, and *Howell* v. *Graves et al.*, *supra*, it would seem proper that our courts should hold that the pleading and trial should be the same as was practiced before the passage of the statute. That in other words, that the statute obviates law questions arising under the common practice, as to whether the form of action should be trespass or trespass on the case.

Our supreme court in referring to this statute in the case of *Scott* v. *Bryson*, decided at the Sept. term, 1874, at Ottawa, and not yet reported, say: "The act of 1872, abolishes the distinction betwen actions of 'trespass' and 'trespass on the case,' to which class trover belongs." We give the exact language of the court, and infer that the court will hold that the statute breaks down the distinction between trespass and trover. Query? Does the statute break down the distinctions that have heretofore been made in the measure of damages?

BOOK NOTICE.

Adams and Durham's Real Estate Statutes and Digest of the Decisions construing or in any way relating to the subject matter of the chapter, which together with numerous explanatory notes by the editors, following the appropriate sections, will make the same of great practical value to the profession. The work is in two large volumes of nearly one thousand pages each, and contains all the real estate statutes of Illinois, from the earliest territorial period down to the present time. The various statutes are arranged under divisions or chapters in alphabetical order. The principal titles being "Aliens," "Attachments," "Charitable Uses," "Conveyances," Dower," "Estates," "Wills," etc.

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INDEX.

ABATEMENT. Pendency of Suit in a Foreign State.

1. A motion for a continuance was properly overruled, as the mere pendency of a suit in one State can not be pleaded in bar or abatement of an action in another State, even between the same parties, and for the same cause of action. *Allen et al* v. *Watt.*, 218.

2. That the filing of a plea in a proceeding in garnishment by the garnishee to the jurisdiction of the court is not a full appearance. *T., W. & W. R. R. Co.* v. *Reynolds, use, &c.*, 322.

ACKNOWLEDGMENT.

1. Prior to the taking effect of the code of 1851, the acknowledgment of the wife was essential to a valid conveyance of her own property; but under the code of 1851, and the act of March 8th, 1860, § 2255, the conveyance of a married woman has had the same effect as a conveyance by a *femme sole*, or by a man, an acknowledgment being necessary to its admission to record, as constructive notice to third persons, but not essential to its validity between the parties. *Westfall* v. *Lee*, 17 Iowa, 12; *McHenry* v. *Day*, 13 Id., 445; distinguished from this, in this, that they were on instruments of date, prior to the act of March 8th, 1858. *Simmons* v. *Hervey et ux.*, 20. This case compared with the statute of Illinois, in note, 33.

2. A certificate of acknowledgment, by a justice of the peace, certifying that Electa S. Davidson, who was personally known to him to be the real person whose name was subscribed to the foregoing instrument, appeared before him and acknowledged the execution thereof as her free act and deed, for the purposes therein mentioned, and that Ezra D. Davidson, husband of the said Electa S. Davidson, personally known to him, &c. Held fatally defective. *Trustees, &c.* v. *Davidson*, 164.

3. A certificate of acknowledgment: "And the said ——— wife of the said ——— having been by me examined, separate and apart, &c. Held insufficient to convey land of the wife. *Merritt* v. *Yates et al.*, 352.

4. A certificate of acknowledgment, when signed and the deed delivered to the grantee, the officer can not amend the same, nor execute a new certificate for the purpose of giving validity to the deed. *Ibid.*

ADJOINING OWNERS OF LAND—DUTY OF SUPPORT.

1. The defendant contended that if he used due care in grading his lot he is not liable for plaintiff's injury, and asked the court to submit that question to the jury. This the court refused, and charged the jury that if the injury was occasioned by the defendant's excavations he is liable, whether the work was done with due skill and care or not. *Altwater* v. *Woods et al.*, 330.

ADMINISTRATOR. See Bill to Redeem.

ANTENUPTIAL INCONTINENCE AND VENEREAL DISRASE.—Is it grounds for Divorce, 193.

ANTENUPTIAT AGREEMENT.

1. By the statute of wills the widow in all cases is allowed certain specific articles of property for the benefit of herself and family and the only question in this case is, is the widow barred of such right by the terms of an antenuptial agreement containing this provision: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each separately and distinctly by each, in the same manner as if they were and had continued unmarried; and upon the death of either party, his or her real estate and personal property shall pass to his or her heirs, executors and administrators, free from all claims of survivor." *Held*,

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ANTENUPTIAL AGREEMENT.
that where there is children of the decedent, constituting the family, that the award is as much for their benefit as for hers, and that she has no power to release it by antenuptial agreement or otherwise.

ATTORNEY AT LAW. *Duty of an Attorney at Law in advising his clients.*
1. *Held*, that an attorney is in one sense an officer of the court, and owes a duty to it and to the law as well as to the client. He violates this duty in advising or in instructing those applying to him for counsel or instruction to attempt a dishonest evasion of the law. *Dunn* v. *Bradley*, 321.
2. His official oath binds him to discharge the duties of his office "according to law." *Id.*

BILL OF EXCEPTIONS.
1. The office of a bill of exceptions; when the same should be signed and when the party should have the same signed.
2. If a party does not allege an exception to the opinion of the court, and reduce the same to writing during the progress of the trial, it is not the duty of the judge to allow such exception, and sign and seal the same. In practice, however, the exception is merely noted, and the bill is afterwards settled.

BILL TO REDEEM.
1. Bill to redeem from a sale under a trust deed. The trustee named in the deed having died, the sale was made by his widow, the administratrix of his estate. It was provided in the trust deed, in default of the payment of the notes secured, &c., on the application of the legal holder, "John Rauscher, or his legal representative," should advertise, sell and convey the land, as the attorney of the grantor. *Warnecke* v. *Lembca*. 177.
2. The only question presented is, whether the administratrix of the deceased trustee could rightfully make the sale. *Held*, that she could not, and that the only remedy was to apply to a court of chancery. to appoint a trustee to complete the execution of the trust, or to file a bill and foreclose the same, as in an ordinary mortgage. *Id.*

CHARITABLE USES. See WILLS.

CHATTEL MORTGAGE.
1. Until breach of the condition of a chattel mortgage, the mortgagor holds a contingent interest, that is liable to levy, otherwise when the mortgage becomes forfeited. *Pike* v. *Colvin*, 129.
2. When the mortgage provides that the mortgagor may retain the possession of the property mortgaged until default in payment, unless seized under execution, &c., if levied on he may possess himself of it by replevin, or if he fail to do so, and it is sold he may recover it from the purchaser, who will be entitled to the surplus, if any remains, after paying the mortgage debt. *Id.*
3. If the mortgagee reduces the property to possession before a levy, or if he takes it from the officer after levy the creditor's only remedy is by garnishment against the mortgagee; this applies to mortgages providing for sale. *Id.*
4. A general description of personal property in a chattel mortgage that will enable the same to be readily identified will be sufficient. *Id.*
5. The interest of such mortgagor of property in his possession, by the terms of the mortgage, is subject to levy and sale, unless the mortgagee shall try the right of property or replevy the same; and unless he does proceed in this manner the officer is justified in selling whatever interest the defendant may have in the property, hence the action of trover will not lie against the officer. *Id.*
6. Where a mortgage contains a clause giving the mortgagee the right in the case at any time before the debt, secured by the mortgage becomes due, feeling himself "unsafe or insecure," to take and sell the property, will, when the same is levied on by virtue of an execution authorize such

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CHATTEL MORTGAGE.
mortgagee to elect to treat the condition as broken, and to take possession of the property by replevin. *Lewis* v. *D'Arcy*, 136.

7. The mortgagor in such case has such an interest in the property as is subject to levy and sale. But the right of the mortgagee can not be defeated by the levy of an attachment or execution, although the levy may have been rightfully made, while the property was in the hands of the mortgagor, still the mortgagee's right to make his election to reclaim the property would prevail against the officer making the levy, as well as the mortgagor. *Id.*

8. The mortgagor on taking possession is compelled to offer the property for sale at once, and the surplus, after paying the debt secured by the mortgage, will be subject to the levy made by the officer. *Id.*

CHURCHES AND CHURCH PROPERTY.
Sylabus of the case of *Hale* v. *Everett*, and note, 140.

CITIES. SEE TOWNS AND CITIES.

CITY CHARTER. SEE TOWNS AND CITIES.

CODE PRACTICE TRESPASS-CASE. See Page, 575.

COMMON CARRIER.

1. This was an action of assumpsit brought by appellees against appellant for unreasonable delay in the transportation of corn and oats shipped at various stations on the line of appellants road, in the spring of 1865, consigned to Cairo. *Held*, that if appellant failed to transport the grain to its point of destination within a reasonable time, and the price of the grain declined in the market at Cairo, the point to which it was consigned, then appellees would be entitled to recover the difference between the market price at Cairo, when it should have arrived and the time it actually arrived; or if, in consequence of the delay there ceased to be a market for the grain at Cairo, then it would have been the privilege and right of appellees without reasonable delay to ship the grain to some point where it could have been sold for the most advantageous price, disposed of it to the best advantage and held the appellant for the loss. *Illinois Central R. R. Co.* v. *Cobb, Blaisdell & Co.*, 514.

2. When a common carrier receives goods for shipment, and gives the consignor a bill of lading, in which the goods are described to be in apparent good order, we see no reason why the bill of lading should not be held *prima facie* evidence that the goods were in good condition. *Id.*

3. The price for which appellees sold oats at that time in Cairo, held competent as showing the market price of oats in Cairo at that time. *Id.*

4. For the purpose of establishing the market price of corn, appellees introduced in evidence a correspondence between them and Bacon & Co. *Held*, incompetent testimony.

5. The measure of damages was the difference between the market price at Cairo when the grain should have arrived, and the market price when it did arrive; and, if there was no market for it in Cairo, appellees were bound to find a speedy market and dispose of it on the most advantageous terms, and the difference between the market price when it should have arrived, and the price thus received, would be the measure of damages. *Id.*

6. In a case like this, it is not enough for the appellees to show they received a specified sum for the grain and then stop, but the burden of proof is on them, to clearly prove the disposition made of the grain, the price received and the expenses, &c.

CONFESSIONS.

1. On a question of the admissibility of the confessions of a prisoner, which had in the first instance been admitted by the court it is not error to submit it to the jury on the evidence to say whether any improper influence was used, and in charging, if there was any, that they should disregard the confession. *Brown* v, *Com.*, 212.

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CONTESTED ELECTIONS.

1. Amendments in contested election *cases*, 538.

2. The court of quarter sessions has a right to amend its record in a public contested election case, even after the case has gone to the supreme court and been remitted to the quarter sessions. *Gibbons* v. *Sheppard*, 567.

CONTRACTS.

1. In cases of executory contracts the law gives the purchaser a reasonable time in which to make a fair examination, to see whether or not the property answers the character called for by the contract. *Doane et al.* v. *Dunham*, 173.

2. The distinction between executed and executory contracts discussed and defined. *Id.*

3. What is a reasonable time for the purchaser to determine whether or not the property answers the contract, is a question for the jury under all the circumstances. *Id.*

4. If the purchaser fails to make the examination within such reasonable time, he will be precluded from offering them back, and rescind the contract and avoid payment on that ground. *Id.*

5. In case of purchase by sample, or in case of contracts for future delivery, the law will imply that the parties contemplated the property or goods to be delivered, shall be of a fair and merchantable quality, and will raise a warranty to that effect. *Id.*

6. But in case the purchaser fails to make the examination and offer to surrender the goods within a reasonable time, under all the circumstances in the case, the property or goods did not answer the contract, such purchaser would still have the right to rely upon the warranty implied by law, in mitigation of damages under the general issue, and would only be liable on a *quantum merruit* for the goods. *Id.*

7. Entire contract—administrator's sale. At an administrator's sale by K., S. purchased a mare and a horse, they having been put up separately and knocked down to him on separate bids. S. discovering afterwards that the horse was unsound, he refused to receive him, but offered to receive and pay for the mare, but K. refused to deliver one unless S. would receive and pay for both. S. persisting in his refusal, the animals were put up and sold for a less sum. *Held*, an entire contract. *Kerr* v. *Shrader*, 332.

8. The court charged the jury that the sale of the horse and mare constituted but one contract, and plaintiff was not bound to deliver one without the other. *Id.*

9. That in the absence of express warranty, representations of soundness made by the plaintiff at the sale constituted no defense, unless the jury found that he fraudulently concealed defects known to him, which could not be discovered by the exercise of ordinary care and caution. *Id.*

10. That if plaintiff used due and proper care, as to time and manner of the second sale, the true measure of damages was the difference between defendant's bid and the amount realized at the second sale, together with costs of keeping and other incidental expenses. *Id.*

11. A corporation cannot be created by contract. *Stowe* v. *Flagg*, 347.

12. The contract of an infant can not be enforced except for necessaries. When the infant represents himself as of age and thus obtains the credit, he becomes liable on the case for damages. *Hughes* v. *Gallans*, 350.

13. Antenuptial agreement. By the statute of wills the widow in all cases is allowed certain specific property for the benefit of herself and family, and the only question in this case is, is the widow barred of such right by the terms of an antenuptial agreement containing this provision: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each, separately and distinctly by each, in the same manner as if they were and had continued unmarried; and upon the death of either party, his or her real estate and personal property shall pass to his or her heirs, executors and administrators, free from all claims of survivor."

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CONTRACTS.

Held, that where there is children of the decedent, constituting the family, that the award is as much for their benefit as for hers, and that she has no power to release it by antenuptial agreement or otherwise. *Phelps* v. *Phelps*, *Ex'r.*, 501.

CORPORATION.

1. The act of Congress, of April 20th, 1871, and the 14th amendment to the constitution of the United States, apply to natural persons only, and not to corporations. *People* v. *The Chicago & Alton R. R. Co.*, 70.

2. A corporation can not be created by the agreement of parties. The act in relation to the formation of manufacturing companies discussed—stock is essential to the existence of manufacturing companies. There must be at least three stockholders. That until such proceedings are had the proposed corporate property is not changed to corporate property. *Stowe* v. *Flagg et al.* 347.

CONSTITUTIONAL LAW.

1. Every man has the right to acquire and protect his property, to be secure against unreasonable searches and seizures, to a falr trial before he can be deprived of life, liberty or property, and in all criminal prosecutions the right to be heard, to demand the nature and cause of the accusation against him, and to meet the witness face to face. *Sullivan* v. *Oneida*, 74.

2. There is no authority in the law or under the constitution, for a county clerk to extend a tax otherwise than equally upon all taxable property in proportion to the value as ascertained and determined by those upon whom the law has imposed the duty of assessing it. *Ramsey* v. *Hoeger*, 112.

3. Under the constitution and law now in force, so much of the act of 1869, entitled an act to fund and provide for paying the railroad debts of counties, townships, cities and towns, as requires the State revenue to be collected on the valuation of the taxable property in the State remaining after deducting in counties, townships, cities and towns which have outstanding indebtedness, incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated and can not be enforced. *Id.*, 112.

4. The 117th section of the act entitled county courts, held unconstitutional, so far as the same authorizes criminal warrants to issue without proof of probable cause. *People ex rel. Smith* v. *Brown*, 202.

5. The constitutional provision that requires "All laws relating to courts to be general and of uniform operation, and the jurisdiction, powers and proceedings, and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts severally, shall be uniform," considered, and held, that so far as the act authorizes prosecutions by information, is unconstitutional and void. *Id.*, 202.

6. When the county may pay for clerk hire. 310.

7. The 7 per cent. taxes collected under auditor's warrant of 1873, 310.

CONTINUANCE.

1. In case of surprise, occasioned by the introduction of important testimony susceptible of contradiction if opportunity be offered, a continuance if asked for may be granted, but after a party has submitted his evidence and taken the chances of a verdict, he will not be allowed a new trial merely on the ground that he has since obtained other evidence cumulative to that given on the trial, and of which he did not then anticipate the importance. *Beaumont* v. *Gray's Ex'rs*, 191.

2. A motion for a continuance was properly overruled as the mere pendency of a suit in one State can not be pleaded in bar or abatement of an action in another State, even between the same parties, and for the same cause of action. *Allen et al.* v. *Watt*, 218.

CONVEYANCE. See ACKNOWLEDGMENT. DEED. SWAMP LAND.

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COUNTY COURT. See CONSTITUTIONAL LAW.

DEED.

1. Under our statute, as at common law, a grantor, a grantee, and a thing to be granted must all be described in a deed, and an instrument in which any of these are omitted is not legally executed, and can convey no title where the wife signed with her husband a blank mortgage, which was delivered to the husband, who inserted therein a description of real estate owned by the wife, and then delivered the paper to a third party with instructions to negotiate it and insert the name of the mortgagee when negotiated, it was held that the instrument was not the deed of the wife. *Simmons* v. *Hervey et rex.*, 20.

2. The power to fill a blank in a conveyance of land, otherwise duly executed, under a parol authority not being presented as a question, the decision of which is essential to a decision in this case it is not conclusively denied; but Dillon, J., is of opinion that it is the simpler, better and safer doctrine, to deny even this power, and the validity as between the parties to a conveyance thus executed, unless it has been subsequently redelivered, or at least confirmed, ratified or adopted by the grantor. This case is entirely different from *McHenry* v. *Day*, 13 Iowa, 445, and *Baldwin* v. *Snowden*, 11 Ohio, 203. *Id.* See note to this case, 33.

3. A deed can not be re-formed as against a married woman. *Trustees* v. *Davidson*, 164.

4. The form of a mortgage for the better securing of loans from the school fund, contains a covenant that in case additional security shall be required the same shall be given to the satisfaction of the board of trustees for the time being. *Held*, that in default of giving such additional security when required, that the mortgage may be foreclosed before the maturity, by the efflux of time. *Id.*, 164.

5. A mortgage, the name of the husband (grantor) in blank, held valid as to him when properly signed. *Id.*, 164.

DIVORCE.

1. Indefinite and uncertain pleadings in actions for divorce on the ground of adultery. The rule as to the time, place and person with whom adultery is alleged to have been committed. *Tein* v. *Tein*, 167.

2. The defendant in his answer averred that the parties with whom the adultery is alleged to have been committed are unknown to him, neither did he state the times or places. *Held*, that while he was perhaps warranted in not giving the names of the persons because unknown to him, he is not warranted in omitting to state the times and places at which the offenses were committed. *Id.*, 167.

3. Rule in divorce cases, 506.

4. The court refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the court. Whether the court can, in any case, grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery. *Query*. *Grossi* v. *Grossi*, 528.

5. A woman who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during co-habitation. *Green* v. *Green*, 528.

6. In a suit of nullity, it appeared from the husband's evidence that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, and that although he had co-habited with her for more than three years the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband, the judge ordinary made a decree *nisi*, to annul the marriage under the provisions of the statute. 36 Vict., c. 31. *H.* v. *H.*, 528.

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DIVORCE.

7. Void decree, for want of proper service. In New York, the second marriage, by statute, is voidable—not void—and the remedy of the first husband is by bill to annul the voidable marriage. The children of such voidable marriage are legitimate. At common law, however, a second marriage is void absolutely. *Hochland* v. *Hochland*, 560.

8. Never ought divorces to be easily obtained. *Potter* v. *Potter*, 485.

9. Only such facts as would be cause for a divorce, warrant a husband or wife in separating from the other. *Id.*

10. The rule governing ecclesiastical courts, with regard to cruelty, is adopted by American courts. *Id.*

11. Courts should not interfere in domestic quarrels, unless there be something to make cohabitation unsafe. *Id.*

12. A husband may be justified in forbidding his wife any further intercourse with her friends. *Id.*

13. A slight assault or battery in anger, in ordinary cases, does not justify a wife in separating from her husband. The attending circumstances should be considered. *Id.*

14. Violence, provoked by the wife, if not excessive, is no cause for separation. *Id.*

EVIDENCE.

1. It is proper in a homicide case, to offer in evidence of identification the photograph of deceased. *Udderzook* v. *Com.*, 170.

2. In an action against a common carrier, for not delivering grain within a reasonable time, it is not enough for the plaintiffs to prove they received a specified sum for the grain and then stop, but the burden of proof is on the plaintiffs to clearly prove the disposition made of the grain, the price received, and the expenses, &c. *Ill. Cent. R. R. Co.* v. *Cobb, Blaisdell & Co.*, 514.

EXEMPTION.

A defendant can claim his exemption out of his effects in the hands of a garnishee, and the garnishee is liable for the amount if he suffers judgment to go against him. *Jones* v. *Tracy*, 107.

GARNISHMENT, 529.

1. Process of garnishment may issue upon judgments in the circuit courts to any county in the State. *T., W. & W. R. R. Co.* v. *Reynolds, use, &c.*, 322.

2. That the filing of a plea in a proceeding in garnishment by the garnishee to the jurisdiction of the court is not a full appearance. It is therefore, held to be error, to render final judgment on sustaining a demurrer to the jurisdiction. *Id.*

3. The judgment in such a case should be a conditional one, as upon default, and a *sci. fa.* should be ordered returnable to the next term of the court, to show cause why the judgment should not be made absolute. *Id.*

GUARDIAN AND WARD, 573.

1. A guardian can not maintain ejectment nor tresspass to ward's land, except in the name of the ward, 573.

2. A guardian has the exclusive right to the custody and management of his ward's estate, and a chancellor can not restrain the guardian from the management of such estate until proceedings to remove him are begun or contemplated. *Northrup* v. *The First National Bank of Scranton*, 279.

GRAND JURORS. THE SELECTION AND SUMMONING OF, 241.

1. The court below refused to permit the grand jurors to be polled on their *voir dire* before the submission of the bill of indictment. *Held*, not to be error. *Brown* v. *Com.*, 212.

2. Under an order for a *tales de circumstantibus*, the sheriff may summons the talesmen from either the bystanders or the body of the county, or both. *Id.*

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HABEAS CORPUS.
1. Habeas corpus, power of towns and cities, office of the writ. *Ex-parte Henry Beherns*, 181.
2. The right of magistrates to imprison in default of payment of fines. *Id.*
3. Power of courts to discharge, and what may be heard on *habeas corpus* can not review the judgment of the committing magistrate. *Id.*
4. Practice, when the record upon which the committing magistrate made the commitment is defective. *Id.*
5. The courts may, by writs of *habeas corpus* and *certiorari* look into the record so far as to ascertain whether or not the judgment will sustain the imprisonment. *Id.*
6. When a *habeas corpus* is directed to a private person to bring up the body of an infant, the court is not bound to deliver the infant into the custody of any particular person. *People ex rel. Potter* v. *Potter*, 485.
7. The court may in its discretion do so.

HOMICIDE.
1. When two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, the death of the one and surrounding circumstances may be given in evidence upon the trial of the prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same which led to the murder of both at the same time. *Shafner* v. *Com.* distinguished. *Brown* v. *Com.* 212.
2. It is proper in a homicide case to offer in evidence of identification the photograph of deceased. *Udderzook* v. *Com.*, 170.

HUSBAND AND WIFE.
1. It is the settled law in this State, that by an instrument *duly executed*, the wife may mortgage her separate property to secure her own or her husband's debt. *Simmons* v. *Hervey*, 20. See note to same, 33.
2. What will justify a separation on the part of husband and wife. *Com. ex rel. Potter v. Potter*, 485.
3. Right of husband and wife, as to the custody of their minor children. *Id.*
4. The husband is liable for necessaries furnished to the wife for the support of herself and family, although she has been declared a *femme sole* trader. *Markley* v. *Wartman et ux.*, 139.

INDICTMENT.
1. Under the statute of Illinois every indictment or accusation of the grand jury is sufficiently correct which states the offense in the language of the statute, or so plainly that the nature of the offense may be easily understood by the jury. *McCutchen* v. *The People*, 90.
2. Form of indictment under the liquor law of the State of Illinois, 96.
3. The indictment in this case, charges that the three persons named, with a stick of wood which each severally had, and held in their several right hands, inflicted the mortal wound causing death. The grounds of the objection to the indictment is, that the act is physically impossible. *Held*, that there is no physical impossibility in the act charged, however improbable it may be. *Coates* v. *The People*, 324.
4. The statute in relation to accessories, at or before the fact, construed and held, that all accessories at or before the fact are principals, and must be indicted as principals and not otherwise. *Id.*
5. That it might be advisable to describe in the indictment, the circumstances of the offense as they actually occurred, but this is not indispensable. *Id.*
6. Under this indictment, proof that either of the defendants struck the fatal blow with the weapon described, and that the others were accessory

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INDICTMENT.

at or before the fact, would be sufficient to sustain a conviction of all of them as principals, and that there would be no variance between the proof and the allegations in the indictment. *Id.*

7. Where the intent is mentioned in the statute as an element of the offense, the intent must be alleged in the indictment, but where the statute is silent as to the motive, no intent need be averred in the indictment. *McCutchen* v. *The People*, 90.

INFANCY.

The contract of an infant at common law can not be enforced except for necessaries. When the infant represents himself as of age, and thus obtains credit, he becomes liable in an action on the case for damages. *Hughes* v. *Gallans*, 350.

INJUNCTION.

1. Upon an application for an injunction to restrain the railroad commissioners of Wisconsin from executing the act of March 11th, 1874, known as the "Potter Act," the court refused the injunction, because they were in doubt if the State had the power arbitrarily to fix certain rates for transportation of persons and property in or out of the State. *Bondholders* v. *Railroad Com'rs*, 188.

2. A preliminary injunction should be granted only to prevent irreparable mischief, such mischief, for which the law affords no adequate remedy. *Northrup* v. *The First National Bank of Scranton*, 279.

3. The right to an injunction must be clearly established, not left in doubt. *Id.*

4. When a preliminary injunction has been erroneously granted, it should be dissolved on motion. *Id.*

5. A guardian has the exclusive right to the custody and management of his ward's estate, and a chancellor cannot restrain the guardian from the management of such estate until proceedings to remove him are begun or contemplated. *Id.*

6. It is a well established rule of law that where power is given to a municipal corporation in express language to become indebted, the terms and purpose of the grant will measure the power, and when the authorities attempt to exceed such power, a court of equity will grant an injunction. *McCormick* v. *East St. Louis*, 380.

INSURANCE.

1. That where insurance is made by a company with full notice of all the facts, and receives the parties money under circumstances leading him to suppose he was receiving in consideration thereof a valid contract of indemnity, must be held estopped from repudiating the contract. *The State Ins. Co.* v. *Lewis*, 331.

2. That when insurance is taken upon mortgaged property, and the insurer is notified of the mortgage, and of course understands that proceedings may at any time be taken to foreclose it, it would be an unjust construction to hold that by the mere commencement of foreclosure proceedings the policy would be annulled. *Id.*

INTEREST.

The recovery of interest depends entirely upon the statute, and unless authorized by the statute it can not be recovered. *Ill. Cent. R. R. Co.* v. *Cobb, Blaisdell & Co.*, 514.

JEOPARDY.

1. In a criminal cause, the discharge of the jury without the consent of the defendant, after it has been duly impanneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards imperative. *Himes* v. *The State of Ohio*, 336.

2. In such case the record must show the existence of the necessity which required the discharge of the duty, otherwise the defendant will be exonerated from the liability of further answering the indictment. *Id.*

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JUDICIAL SALE.

Mere inadequacy of price is not ground for setting aside a sheriff's sale, but there must be other ground connected with inadequacy of price to warrant a court of equity to interfere. *Davis* v. *Pickett*, 553.

JUDGMENT LIENS. See PRIORITY OF LIENS.

JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE—JURISDICTION.

1. Whilst a justice of the peace could only render a fine not exceeding $100, yet under the charter in evidence in this case, he is authorized to adjudicate to an unlimited amount of property, and this seizure is unreasonable and in violation of the declaration of rights. *Sullivan* v. *Oneida*, 74.

2. May hold over. A justice of the peace may hold his office for four years and until his successor is qualified, and if such successor fails to qualify, the prior incumbent may legally continue to exercise the duties of the office until a successor is elected that does qualify, 310.

See also, the opinion of Blodgett, J. Township Bond, 538.

3. A justice of the peace may keep a special docket for the entry of the record of chattel mortgages. *Pike* v. *Colvin*, 129.

LANDLORD AND TENANT.

1. The record in this case presents the direct question, whether the landlord has a lien upon the property, other than growing crops, of the tenant after it is removed from the demised premises, which can be enforced against a *bona fide* purchaser. *Hadden et al.* v. *Knickerbocker et al.*, 550.

Held, that no specific lien is created or given on property other than growing crops of the tenant, and that when property has been removed from the demised premises prior to the levy of the distress warrant, and sold to a *bona fide* purchaser for value, such purchaser will take the title to such property. But if the sale is fraudulent the rule would be otherwise. *Id.*

LIENS. See PRIORITY OF LIENS.

MANSLAUGHTER.

1. In all cases where a person shall be convicted of manslaughter, the statute expressly empowers the jury to fix the time the person convicted shall be confined in the penitentiary; which may be for natural life, or for any number of years to be designated in the verdict, and that the court on a plea of guilty has the power to sentence for life, or for any number of years to be designated by the verdict. *Coates* v. *The People*, 324.

MARRIAGE CONTRACT, 334.

MARRIED WOMEN.

1. At common law, the husband is presumed to own all the personal property in the possession of the wife, while they are living together. The act of 1861, was not designed to overcome the common law in that respect. The wife in order to maintain replevin against an officer levying an execution against the husband, to enable her to claim the benefit of the act of 1861, must bring her case within its provisions, and if she acquired the property during coverture, in good faith from any person other than her husband, this is an affirmative fact for her to establish, and the law requires her to show that the money or property that went to pay for the property in question, was her own separate property, acquired in good faith from some person other than her husband. *Reeves v. Webster*, 144.

2. The rule deducible from *Carpenter* v. *Mitchell* and *Cookston* v. *Toole*, is that the only contracts of a married woman that can be enforced against her, are such as relate to her separate estate, or necessarily incident to its enjoyment. *Williams* v. *Hugurin*, 418.

3. The rule is, that to render the separate estate of a married woman liable, the debt must have been contracted in regard to it, or for her own benefit, on the credit of her own separate property, or where by some ap-

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MARRIED WOMEN.
propriate instrument executed by her with a view to make the debt a specific charge upon it *Id.*

4. A general engagement to pay a debt contracted by a single bill or note, having no reference to her separate property, will create no such charge upon it as can be enforced in a court of equity. *Id.*

5. In this case, the liability sought to be enforced arose out of the fact that the appellant endorsed the note given by her husband in payment of his own indebtedness. It is silent as to the separate estate of the wife, and it would be making an agreement for the parties which they never contemplated making for themselves, to construe the note into a contract to pay out of a particular property. *Id.*

MECHANICS' LIEN.

1. That the mechanics' lien law of this State does not apply to labor or materials furnished to the State in the improvement of its real estate. That the entire scope of the act refers to individuals and private corporations. *Thomas* v. *Trustees*, 356.

2. That the Industrial University at Champaign, is a State institution, belonging to and controlled by the State, and the property is not subject to the lien of mechanics or material men. *Id.*

3. In this case the petition fails to set out the terms of the contract with the principal contractor, and that the sub-contractor was within the power of the principal contractor to make it so as to bind the owner or the property, or that there was a sufficient sum due the principal contractor to pay the plaintiff, nor that plaintiff had performed his contract. *Held*, that the petition was defective. *Id.*

MUNICIPAL BONDS.

1. A material change in the character of a railroad company will have the effect of releasing a subscription to its stock. But the change must be something that was not authorized at the time the subscription was made. *Nugent* v. *Supervisors of Putnam County*, 251.

2. A subscription was made by a county to a railroad which was consolidated with another railroad, the charter of the company to which the subscription was made permitting the consolidation. It was held that the subscription was not released by the consolidation. *Id.*

3. A purchaser of municipal bonds is put on inquiry as to three points: 1st. As to whether there ever has been authority of law by which the the bond has been issued. 2d. As to whether the bond has been issued by the proper officials. and within the scope of their authority. 3d. Has their issue been approved by a popular vote, and if so, was the election called by the proper officer authorized by law to call the election, 263.

4. The election must be held in conformity to the law authorizing the same, and must have been called by the proper officer, and where the election is called by the wrong authority, the bonds issued in pursuance of such an election, will be void in the hands of innocent holders, 263.

5. This suit was brought to recover on eight coupons for $100 each, issued by the county of Kankakee, for interest maturing July, 1873 and 1874, on railroad bonds issued by the county in aid of the Kankakee and Illinois River Railroad. *Warrener* v. *The County of Kankakee*, 556.

6. The defense interposed was in substance, that after the county had voted the bonds in aid of the railroad, but before actual delivery the company had consolidated its stock and franchises with the stock of a railroad corporation in Indiana, known as the Plymouth, Kankakee and Pacific Railroad Company, and that said consolidation was invalid, because it was not assented to in writing by all of the stockholders of Illinois; and also, because the Kankakee and Illinois River Railroad Company had no road constructed. *Held*, that the county could not set up this defense in its own behalf in the manner it had attempted to do, for the reason, it had allowed the consolidation in some form to take effect, and had allowed the consolidated company to put the bonds in circulation. *Id.*

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MUNICIPAL BONDS.
7. The right of the company to consolidate under its charter is limited, but that did not take away the right from the company to consolidate under the general law of the State, by complying with all the requirements of the law. *Id.*

NE EXEAT.
1. *Held*, that in a proceeding by *ne exeat*, not of an equitable nature, the plaintiff in analogy to the proceeding by *capias ad respondendum* must show by his petition, by facts stated and circumstances detailed, that the debtor has been guilty of fraud, or that there is a strong presumption of fraud. *Malcolm* v. *Andrews*, 561.
2. The English idea that a writ of *ne exeat* is a prerogative writ, is inapplicable in this country. Note 565.
3. The writ has now become an ordinary process of courts of equity, and it is as much a writ of right as any other process used in the administration of justice, and in cases of a purely equitable nature it must be granted when a proper case is presented. *Id.*

ORDINANCES.
1. A town or city can not give its ordinances extra territorial effect, except so far as it may be clearly authorized to do so. Note to ***Sullivan*** v. *The City of Oneida*, 81.
2. The power of towns and cities to control. *Id.*
3. The ordinance of the city requiring railroad companies to construct crossings at the intersection of their roads with the streets in the city held valid under the charter of the city. ***The City of Bloomington*** v. ***The Illinois Central R. R. Co.***, 314.
4. The ordinances of the city of East St. Louis, providing that the committee of ways and means of the common council "be authorized to adjust and compromise and claims of persons holding certificates of indebtedness issued by the metropolitan police commissioners of the City of East St. Louis, considered and held void. ***McCormick*** v. ***The City of East St. Louis***, 380.

OPINION OF COURT—How far Authority.
1. The language used in an opinion is always to be restricted to the case before the court, and is authority only to that extent. The reasoning, illustrations and references, contained in the opinion of a court are not authority or precedent, but only the points arising in the particular case which are decided by the court. *Lucas* v. *The Board of Commissioners of Tippecanoe Co.*, 287.

PARENT AND CHILD.
1. A father is entitled by law to the custody of his legitimate infant if he has means and fitness for the trust. If he abuse the trust the court will protect the child. *Potter* v. *Potter*, 485.
2. A mother wrongfully living apart from her husband, has no legal right against the husband, to the custody of their legitimate infant. *Id.*
3. Such infant has a legal right to nurture from its parents which they are bound to observe. *Id.*
4. When the interests of the child would be promoted by the mother's nurture, it should be placed in her custody. *Id.*
5. When the father's means and fitness for the child's nurture, are better than or equal to the mother's, the child's interest and the father's legal right, make the latter the custodian of the child. *Id.*
6. In deciding as to the custody of children, courts are guided by the child's interest.
7. The house of a third person, such person being addicted to the habitual use of profane language and intoxicating liquors to excess, is not the proper place for rearing a male child. *Id.*
8. Whenever a father becomes subject to the jurisdiction of the court in a proceeding for divorce, his common law right to the custody of his

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PARENT AND CHILD.
infant children, must necessarily yield to the discretionary power over thc subject vested by the statute in the courts. Note to Potter case, 495.
9. The laws and customs of a State, are the birthright of a child.
10. Modification of decree of divorce, so far as the same relates to the custody of children. *Id.*

PAROL AUTHORITY TO FILL BLANKS IN A DEED. See DEED.

PARTNERSHIP, 527.

PATENT.
That when lands are entered and the patent issued to the purchaser, a third party can not in ejectment, attack it collaterally, attack it for fraud. *Grantham* v. *Atkins*, 37.

PHOTOGRAPH.
It is proper in a homicide case, to offer in evidence of identification the photograph of the deceased. *Udderzook* v. *Com.*, 170.

PRINCIPAL AND SURETY, 277.

PLEADING AT LAW.
1. It is a rule of pleading, that the plaintiff must in his declaration state the nature of defendant's liability, and in order to recover must prove the facts as alleged. *Gridley* v. *The City of Bloomington*, 44.
2. Although this may be done by a general mode of allegation, yet if instead of doing so, the plaintiff states the ground of the defendant's liability with unnecessary particularity, he must prove it as laid. *Id.*
3. In a suit against one of the makers of a promissory note, a plea by the defendant, that his co-maker was at the time of making the note, a married woman, and principal in said note, and that he signed it as her surety, is subject to a demurrer. *Curmbley* v. *Searcy*, 83. See SET-OFF.
4. Pleading.—Negligence. A complaint against a railroad company charged that through the fault, misconduct, and negligence of the servants and employees of the defendant in running the locomotive and train out of their regular time, and at a high rate of speed, to-wit: forty miles an hour, and without giving any of the proper signals of their approach, the locomotive struck and killed two mules of the plaintiff, at a point where a highway crossed the railroad. *Held*, this was a sufficient statement of negligence. *I. C. & L. R. R. Co.* v. *Hamilton*, 287.
5. In a complaint under the Indiana statute, to recover for stock killed by a railroad traid where the road is not fenced, it is sufficient to aver that the road was not securely fenced at the place where the animal got upon the track. *P., C. & St. L. R. R. Co.* v. *Brown*, 288.

PLEA OF GUILTY.
The plea of guilty admits that the act was committed in manner and form as charged in the indictment. *Coates* v. *The People*, 324.

PRACTICE.
1. Practice—Affidavit of plaintiff's claim—Defendant's plea and affidavit of merits of defense. The plaintiff filed his affidavit of claim with his declaration. The defendant filed his plea of the general issue, with an affidavit of defense to the amount of $42. The plaintiff then filed a written admission, that that amount might be deducted, and asked for a judgment for the residue. *Held*. 1st. That the affidavit filed with the plea should disclose with reasonable certainty the entire ground of defense relied upon. 2d. That if the affidavit was true this was all the defense there was to the writ. 3d. That having in the affidavit alleged one defense, which had been confessed, it was not competent to set up an additional defense not included in the affidavit. *Allen et al.* v. *Watt*, 218.
The practice discussed in note, 221.

PRINCIPAL AND ACCESSORY.
1. One who, participating in the felonious intent, is present, aiding and abetting the commission of a murder or other felony, is a principal, al-

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PRINCIPAL AND ACCESSORY.

though not himself the immediate perpetrator of the act. *Worden* v. *The State of Ohio*, 336.

2. The presence, either active or constructive, of the accused at the commission of a felony is not a necessary ingredient in the offense of aiding, abetting or procuring another to commit it, defined by section 36 of the crimes act. *Id.*

PRIORITY OF LIENS.

1. The time of the commencement of a term of court is to be determined by the record of the court, in connection with the statute under which the term is held, and parol evidence is not admissible for the purpose.

2. In determining the question of priority between the lien of a judgment and the lien of a mortgage, filed for record on the first day of the term, where the record fails to show the hour at which the court met, the session of the court will be presumed to have commenced at 10 o'clock, A. M., that being the hour, on the first day of the term, fixed by statute for the return of the *venires* for the grand and petit juries, and at which time the court, where a different hour has not been prescribed, ought to have opened.

3. In a suit by a judgment creditor, to marshal the several liens on real estate, and to distribute the proceeds of the sale thereof among such liens, according to their respective priorities, the fund still being under the control of the court, the fact that in a former suit between two of the defendants, to which the plaintiff was not a party, a decree had been rendered, giving to the junior lienholder priority, can not be pleaded as an estoppel to preclude the court from awarding to each lien priority according to its merits, the decree in the former suit having been rendered without the presence of the necessary parties, and the fund being insufficient to discharge all the liens.

PROMISSORY NOTE. ASSIGNMENT WITHOUT RECOURSE.

1. In a suit by second indorser against the maker of a promissory note, assigned without recourse, for full value before maturity, it was held that an assignment before maturity for value, without recourse, does not in itself raise a suspicion of an infirmity in the consideration of the note, and is not in itself sufficient to prompt inquiry into the consideration, who is about to take such note for value by indorsement, without recourse. *Stephenson* v. *O'Neal et al.*, 144.

RAILROADS.

1. This was an action by plaintiff against the defendant, to recover damages caused by the standing of freight cars on the company's railway track in front of an eating house of the plaintiff, at the time when the passenger trains on defendant's road stopped at the station for meals. *Held*, that the plaintiff could not recover. *Disbrow* v. *The Chicago and Northwestern R. R. Co.*, 65.

2. The act of April 20th, 1871, does not authorize a transfer from a State court to the United States court of a prosecution by the State against a railroad corporation for a violation of its laws. *People* v. *Chicago & Alton R. R. Co.*, 186.

3. Upon an application for an injunction to restrain the railroad commissioners of Wisconsin from executing the act of March 11th, 1874, known as the "Potter law," the court refused the injunction, because they were in doubt if the State had the power, arbitrarily to fix the rate for the transportation of persons and property in or out of the State. *Bondholders* v. *The Railroad Commissioners et al.*, 188.

4. The charters of the plaintiff and defendant, and the ordinances of the city council in relation to street crossings examined, and held, that the city council may require all railroads within the city, to construct and keep in repair suitable crossings and approaches thereto. That it is within the police power of the State to authorize the city council to require all existing

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RAILROADS.
railroads to construct and properly maintain suitable crossings at all street-crossings within the city. *The City of Bloomington* v. *The Illinois Cent. R. R. Co.*, 314.

5. The plaintiff below, lost an eye through the quarrel of a couple of drunken men on a car in which he was a passenger. *Held*, that the company was liable, as it was the clear duty of its employees to repress all disorderly conduct in their cars. *Pittsburgh and Connelsville R. R. Co.* v. *Pillow*, 498.

6. *Signals.* There is no statute in Indiana, that requires railroad companies to blow the whistles or ring the bells of their locomotives on approaching a highway crossing, but that duty may devolve upon them in the exercise of ordinary care, without a statute. Whether in a given case, ordinary care requires the making of such signals is a question for the jury. *I. C. & L. R. R. Co.* v. *Hamilton*, 288.

Same—Defective Fence.

7. A small portion of a fence along a railroad track was burned on Thursday. The next Sunday a horse escaped through the opening to the track, and was killed on that day by a passing train. The section boss whose duty it was to repair fences, had passed over that part of the road twice a day between the time of the injury to the fence and the killing of the horse. *Held*, that the company was liable. *T., W. & W. R'y Co.* v. *Cohen*, 288.

8. This was an action of assumpsit brought by appellee against appellant, for unreasonable delay in the transportation of corn and oats shipped at various stations on the line of appellants road, in the spring of 1865, consigned to Cairo. *Held*, that if appellant failed to transport the grain to its point of destination within a reasonable time, and the price of grain declined in the market at Cairo, the point to which it was consigned, then appellees would be entitled to recover the difference between the market price at Cairo when it should have arrived and the time it actually arrived. *Illinois Central R. R. Co.* v. *Cobb, Blaisdell & Co.*, 514.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.
REMOVAL OF CAUSES FROM THE STATE COURTS TO THE UNITED STATES COURTS, 56.
FORMS OF PETITION, 60, 62.
FORMS OF BOND, 63, 64.

1. The Act of Congress of April 20th, 1871, does not authorize the transfer from a State to a United States court, of a prosecution by the State against a railroad corporation for a violation of its laws. *People* v. *Chicago and Alton R. R. Co.*, 186.

RULE IN SHELLY'S CASE.
The rule in Shelly's case is: "When the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance there is a limitation, either mediately or immediately, to his heir or heirs of his body, the word "heirs," is a word of limitation of the estate, and not a word of purchase. The remainder is immediately executed in possession in the ancestor so taking the freehold," 334.
Note to *Voris* v. *Sloan*, 229.

SCHOOL FUNDS.

1. The statute authorizing loans by the Township Treasurer, prescribes the form of the mortgage to be given as security, and declares that such mortgages shall be acknowledged and recorded, as required by law of other conveyances of real estate. *School Trustees, &c.* v. *Davidson*, 164.

2. The form of mortgage required by statute contains a covenant, that in case additional security shall be required, the same shall be given to the satisfaction of the Board of Trustees for the time being. *Held*, that in default of giving such additional security when required that the mortgage may be foreclosed before maturity, by the efflux of time. *Id.*

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SCHOOL FUNDS.

3. The authority to require such additional security is given by statute, and the covenant contained in the mortgage to comply, vests the Board of Trustees with the discretion of determining when a case arises for the exercise of the power, and unless it is exercised fraudulently or under such circumstances of abuse or oppression as amounts to fraud, the propriety of the exercise can not be made a subject of inquiry by the courts. *Id.*

SCHOOL DISTRICT.

1. The point in the bill in this case is, that appellants in order to keep some four colored children from attending the same school in the district that is provided for others, erected a small house on the same lot where the other school house stands, and at the expense of the tax-payers propose to employ an additional teacher to instruct the colored children in this small building, separate and apart from the other children in the district. *Chase et al.* v. *Stephenson et al.*, 125.

2. The free schools of the State are public institutions, and in their management and control, the law contemplates that they should be so managed that all children within the district, between the ages of six and twenty-one years, regardless of race *or color*, shall have equal and the same rights to participate in the benefits to be derived therefrom. *Id.*

3. While the directors have large and discretionary powers in regard to the management and control of schools in order to increase their usefulness, they have no power to make class distinction, neither can they discriminate between scholars on account of their color, race or social position. *Id.*

4. Had the district colored children sufficient for one school, and white children for another, and had the directors in good faith provided a separate room for each, where the facilities for instruction were entirely equal, is a question not determined in this care. *Id.*

5. The attempt on the part of the directors to maintain a school solely to instruct three or four colored children of the district, when they can be accommodated at the school-house with the other scholars, can only be regarded as a fraud upon the tax-payers of the district, any one of whom has the right to interfere to prevent the public funds from being squandered. *Id.*

SPIRITUOUS LIQUARS.

1. Spirituous liquors, ale or beer, are property; they are chattels, articles of consumption and of commcrce. Their abuse may be restrained and punishment inflicted on those who sell them to the injury of others. As well as other chattels, they may come under the designation of a nuisance, and to a certain extent lose their quality of property, but they can not do so *per se*. *Sullivan* v. *The city of Oneida*, 74.

2. That the clause of the third section of the liquor law of 1872, which declares, that all places where intoxicating liquors are sold in violation of the act, to be a common nuisance, and shall be shut up and abated, does not authorize a destruction of property. *Streaton* v. *The People*, 85.

3. The first section of the act construed to prohibit the sale of liquors without a license. *Id.*

4. That under the police power of the State, the legislature may authorize the abatement of a public nuisance, and the carrying on of an illegal traffic in intoxicating liquor is a nuisance, and may be so declared and abated. *Id.*

5. The second section of the liquor law of 1872, makes it absolutely unlawful notwithstanding a party may have a license obtained under the provisions of the first section of the act to sell intoxicating liquors to minors, unless upon the written order of the parents, guardian, or family physician, and contains an absolute restriction upon selling such liquors to persons intoxicated, or who are in the habit of getting intoxicated. *McCutchen* v. *The People*, 90.

6. The license procured under the first section of the act confers no authority on the licensee to sell intoxicating liquors to a minor except on one

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SPIRITUOUS LIQUORS.
condition, viz: He shall have a written order of his parents, guardian or family physician. *Id.*

7. The same section absolutely prohibits the selling of such liquors to persons intoxicated or in the habit of getting intoxicated, and the license obtained under the first section will afford no protection. *Id.*

8. The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge he does it at his peril. *Id.*

9. If the seller does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to buy, he must refuse to make the sale; and it is no answer to this view that the seller may be imposed on. This is a risk incident to the business. *Id.*

10. It is not deemed a material inquiry, whether the sale in this case was made by appellant, his agent or servant. In either case the principal is guilty within the meaning of the statute. The agent must sell in the name of his principal, and the presumption must be deemed conclusive against the principal, that the agent or servant act within the scope of his authority in making the sales. *Id.*

11. The civil remedy given by the act of 1872, entitled, "An act to provide against the evils resulting from the sale of intoxicating liquors" maintained, and the statute held highly penal in providing an action unknown to the common law, and should receive a strict construction.

12. The statute contemplates injury in person or property, or means of support, and not the anguish or pain of mind and feelings the plaintiff suffered by reason of the intoxication of her husband. *Id.*

13. The party suing under the provisions of this statute, must prove to the satisfaction of the jury actual damages, and without such proof exemplary damages can not be awarded against the defendant. *Id.*

14. Exemplary damages can not be awarded as *punishment* in this action by force of the statute, for the reason the statute provides the public shall avail itself of its punitive provisions, which are fines and imprisonment in the county jail.

15. Actual damages to the plaintiff, is the central idea of this statute, and if actual damages can not be established the case falls.

16. It is proper for the defendant to prove that he did not sell the liquor himself, and that he had forbidden his bar-keeper to sell liquor to the party, in mitigation not of actual but exemplary damages. *Id.*

17. *Intoxicating Liquor—Social Club—Clerk.* A person who acts as the agent or employee of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished for a violation of the prohibitory liquor law, under section 1563 of the revision. *The State* v. *Mercer*, 311.

18. The gist of the offense defined by the 4th section of the act of May 1st, 1854, to provide against the evils resulting from the sale of intoxicating liquors, is the keeping of a place of public resort, where intoxicating liquors are sold in violation of law, and not that the place is otherwise of any particular description. *O'Keefe* v. *The State of Ohio*, 336.

19. Where the place alleged to have been kept by the accused is described as a room, no case of variance is presented, although the proof given in support of the charge shows that the room kept was a cellar or grocery. *Id.*

20. Under chapter 3, section 3, of the laws of 1870, trespass for an assault and battery may be maintained against four persons who separately sold intoxicating liquors to one B, in violation of law, to recover damages occasioned by an injury to the person of the plaintiff, done by B, while in a state of intoxication by the liquor so furnished to him. *Bodge* v. *Hughes*, 527.

STATE'S ATTORNEY.

1. It is the right and duty of a State's Attorney to prosecute or defend

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STATE'S ATTORNEY.

all suits brought by or against the county, and the county board have no authority to deprive him of that right. 310.

3. County board may employ counsel to assist the State's Attorney, 310.

STATUTES.—INTERPRETATION.

1. It is a settled rule of interpretation that statutes must be so interpreted as to give effect to the whole; and one part must be so construed by another, that the whole may stand. *Grantham* v. *Atkins*, 37.

2. Interpretation of statutes of sister states when the same is adopted in this State. *Streator* v. *The People*, 85.

3. It is a rule when the legislature adopts substantially the statute of another State, it is presumed it adopts also, the construction previously given by the courts of that State, unless such construction is inconsistent with the spirit and policy of our laws. *Streator* v. *The People*, 85; *McCutchen* v. *The People*, 90.

4. The construction given to the Ohio liquor law by the courts of that State can not but be regarded as being inconsistent with the spirit and policy of our laws, and no presumption prevails that in adopting it the legislature also adopted the construction that had previously obtained in that State. *Id.*

5. The legislature having adopted substantially the statute of the State of Ohio, it is presumed it adopted the construction previously given by the courts of that State. *Freaze* v. *Tripp*, 119.

SUBSCRIPTION.

Where a subscription is made upon several distinct and separate conditions, these conditions must all be performed before the subscription can be collected. *Porter* v. *Raymond*, 527.

SWAMP LANDS.

1. The act of Congress, entitled an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, approved March 28th, 1850, considered and construed. *Grantham* v. *Atkins*, 37.

2. The title did not vest in the States until the issuing of the patent. *Id.*

3. That under the acts of Congress of Sept. 28th, 1850, March 2d, 1855, and March 3d, 1857, vacant and unappropriated land is subject to private entry, the same not having been confirmed to the States. *Id.*

TAXATION.

1. The 1st, 4th, 5th and 9th sections of the act of 1869, (Ill.,) to fund and provide for paying the railroad debts of counties, townships, cities and towns, considered and construed. *Ramsey* v. *Hoeger*, 112.

2. This statute does not constitute a contract between the State and the creditors of the corporations intended to be aided, because the legislature was prohibited from making such a contract by § 38 of Article 3, of the constitution of 1848. *Id.*

3. The effect of the act was to exempt tax-payers in the townships, counties, cities and towns availing of its provisions, from the payment of so much of the State tax as is appropriated to the particular counties, townships, &c. *Id.*

4. The rule is, that exemptions from taxation are always subject to be recalled when they have been granted as a mere privilege, and not for a sufficient consideration. *Id.*

5. There is no authority in law, or under the constitution, for a county clerk to extend a tax, otherwise than equally upon all the taxable property, in proportion to its value, as ascertained and determined by those upon whom the law has imposed the duty of assessing it. *Id.*

6. Opinion of the Attorney-General as to the levy of taxes for 1873.

TELEGRAPHING.

1. This is an action to recover damages for the neglect of the defendant and its servants to transmit the following message from Port Huron, Michi-

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TELEGRAPHING.

gan, to Milwaukee, Wisconsin: "Buy twenty thousand, seller June, pay telegraph there." It is admitted the message meant, and would have been understood by plaintiffs agent to buy twenty thousand bushels of No. 2 wheat. *Hubbard et al.* v. *The W. U. T. Co.*, 363.

2. Telegraph companies are not insurers, and do not guarantee the de-delivery of all messages with entire accuracy, and against all contingencies, but are held to ordinary care and vigilance in the performance of their duties; and to answer for the neglect and omission of duty of their servants and agents. This rule applies also to night dispatches. *Id.*

3. The measure of damage discussed and the authorities reviewed, and held that the plaintiff was entitled to recover nominal damages for a breach of the contract. *Id.*

4. The court below having found the issues for the defendant, and the supreme court holding that the judgment below was wrong, but that the plaintiff was only entitled to nominal damages. The court refused to reverse the judgment. *Id.*

5. The blank upon which the message in this case was sent, contained amongst other provisions the provision: "That said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured." The company charging one-half the regular rates for repeating the message. *Held*, that one who elects to save the small sum charged for a more extended liability, can not reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes; and that this principle applies to every stage of dealing with the message. *Redpath* v. *W. U. T. Co.*, 382.

6. In Candee's case in note, the court say: "The message in question was a night message, written upon what is called a night message blank furnished by the company, and which contains special regulations for messages of that description. The regulations printed upon, and constituting the heading of the night message blank, and underneath and subject to the terms of which the message was written and directed to be sent, are the only ones applicable to such message, or which can be said to have formed the contract between the plaintiff and the company." *Held*, that all regulations, the design of which is to protect the company from responsibility on account of the gross negligence or fraud of its agents and employees, in the transmission or delivery of a message which the company undertakes for a valuable consideration to send, is unreasonable, against sound policy and void. *Candee* v. *The W. U. T. Co.*, 376.

7. That the regulations were intended to secure the company against liability for the injurious consequences flowing from its own, and from the negligence and omissions of its agents and operators in and about the performance of its contract, entered into with the sender of the message. The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance or attempted performance of the contract, or for the entire failure to perform it from whatever cause occurring. *Held*, that aside from the objection resting on the grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, and that there is no consideration for such stipulation on the part of the sender of the message, and that so far as he is concerned it is void for that reason, although exacted by the company and fully assented to by him.

8. That the company holding itself out as ready, and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consid-

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TELEGRAPHING.
ation it can not be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence according to the request of the sender. *Id.*

9. The regulations can not serve to shield the company from the consequences resulting from the gross negligence or fraud of its officers or agents, or from their entire failure to perform the service, no good excuse being offered or shown; and held that the plaintiff was entitled to recover nominal damages. *Id.*

10. The rule of damages is, that where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract, should be either such as may fairly and substantially be considered arising naturally, that is according to the usual course of things from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract, as the probable result of the breach of it.

TOWNS AND CITIES.

1. The consent of the city to construct a vault under a sidewalk, on a public street, may be inferred from lapse of time. *Gridley* v. *The City of Bloomington*, 44.

2. The general rule is, that the occupant and not the owner as such, is responsible in consequence of a failure to keep the premises occupied in repair. *Id.*

3. The city can not recover against the land, where the prime cause of the injury was caused by the gross negligence of the tenant. The right to recover by the city is dependant on the right of the city to recover against the tenant in possession, and the right of the tenant to recover against the landlord to avoid circuity of action. *Id.*

4. The city is primarily liable, but may recover back the amount from the person whose duty it was to keep the premises in repair. *Id.*

5. City Charter—*Ordinances—Liquor Nuisance.* Where a city charter authorized the common council to declare the selling, giving away, or keeping on hand for sale, any spirituous or intoxicating liquors, etc., in the city a nuisance, it does not authorize an ordinance making it an offense for any person within the city to have in his or her possession any intoxicating liquors, etc. The ordinance exceeds the power in the charter as it declares the possession, without the intent to sell, an offense. *Sullivan* v. *The City of Oneida*, 74.

6. The charter only contemplates a search, in the event that liquors were in the possession of some person for sale within the city. The ordinance authorizes the search and seizure if the liquors were kept in the city, whether the intention was to sell them or ship them for sale elsewhere. Such an ordinance might interfere with general commerce, but when confined to the ordinary traffic between the city and its neighboring towns and cities, it is unjust and illegal, and the ordinance is *ultra vires* and void. *Id.*

7. City Ordinances—*Presumption of Innocence.* It is no answer to say that the person whose liquor is seized may prove his innocence—may show the purpose to be lawful. The law ought not be guilty of such harshness as to require a man to prove his innocence where there is not even a suspicion of his guilt. *Id.*

8. Legislative Power—*to restrain sale of spirits.* It has often been decided that the general assembly may prohibit the retail of intoxicating liquors. But this charter has gone far beyond that, as it authorizes the council to license, regulate and tax the sale of such liquors; to declare the sale, and keeping on hand for sale, a nuisance; to provide for its summary abatement and suppression; and it empowers the police magistrate to issue his warrant to search the premises of persons suspected of selling. It makes the mere possession *prima facie* evidence of unlawful intent, and, with-

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TOWNS AND CITIES.
out satisfactory explanation, evidence of sale and keeping on hand for sale. *Id.*

9. CITY ORDINANCE. The ordinance authorizes the police magistrate, on complaint that any person has such liquor for sale, more than one gallon, to issue his warrant for the search of his dwelling house, and if liquors are found they shall be seized, and person arrested, and both brought before the magistrate, who shall at once proceed to try the person, and if he should not offer a satisfactory explanation and show that he had the liquors for a lawful purpose, he shall be fined, and ordered to the common jail until fine and costs are paid, and the liquors ordered sold on execution and the proceeds applied to the payment of the fine and costs. *In.*, 75.

10. The ordinance is objectionable because, while it professes to prevent the sale of liquors because they are declared to be a nuisance and should be abated, it requires the liquors to be sold by the officer. *Id.*

11. SAME—*objectionable.* Another objection is, that both the charter and ordinance authorize the seizure of all liquors found, without reference to quantity; whilst the ordinance only authorizes a fine of $100, it authorizes a seizure of liquors to the value, it may be, of thousands of dollars, which would be ordered to be sold, as is supposed, to satisfy the fine, as it will not be presumed the sale would be ordered merely for the exercise of unusual or arbitrary power. Again, the ordinance does not require the surplus to be returned to the owner. *Id.*

12. A municipal corporation is responsible for the damage resulting to a foot passenger, from an accident to him, caused by the dangerous accumulation upon the sidewalk of a street, of ice and snow. *McLaughlin* v. *City of Corry*, 512.

13. The powers of towns and cities to pass ordinances. *Exparte Beherns*, 181.

14. The city having furnished a safe and secure sidewalk over which plaintiff's son might pass, the city will not be liable for injuries received by persons knowingly passing over a dangerous walk. *Lovenguth* v. *The City of Bloomington*, 266.

15. In an action for an injury to plaintiff's person, alleged to have been caused by the defective condition of a public walk in the defendant city, it appeared that plaintiff, on his way to a railroad depot, passed westward along the *south* side of a certain street until he reached a bridge connecting the east and west portions of said street; that after crossing the bridge, he *passed over to the north side* of said street, and in descending from the bridge to the sidewalk, along a plank walk which descended about two and a half feet in twenty, he fell and was injured; that it was a bright starlight evening in winter, with snow upon the ground; that plaintiff had in one hand a satchel and in the other books; that there were strips nailed across said descending walk, but these were entirely covered with packed snow and ice, and the whole surface of the walk was smooth and slippery. It also appeared that plaintiff had been on the walk frequently, and knew that it was an inclined plane at this point; but there was no evidenee that he knew of its peculiarly slippery and dangerous condition at that time. It was one of the principal walks of the city, over which hundreds of persons were daily passing. There was a less descent from the bridge to the sidewalk on the *south* side of the street, and the middle of the street was planked. *Held*, that upon these facts the court did not err in *refusing to instruct* the jury, as a proposition of law, that plaintiff was *guilty of negligence* in descending upon this walk to the north side of the street; but that question was properly *left to the jury*. *Perkins* v. *The City of Fond du Lac*, 410.

16. The *mere slippery condition* of a sidewalk, arising from the ordinary action of the elements (as snow and ice), is not a defect which renders the town or city liable under the statute, (*Cook* v. *Milwaukee*, 24 Wis. 270, and 27 id., 191); but if the walk is in other respects unskilfully or improperly

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TOWNS AND CITIES.

built, so as unnecessarily to increase the danger of persons walking thereon while it is covered with snow and ice, this will render it defective or insufficient within the meaning of the statute. *Id.*

17. The ordinance of the city of East St. Louis, providing that the committee of ways and means of the common council "be authorized to adjust and compromise any claims of persons holding certificates of indebtedness issued by the metropolitan police commissioners of the City of East St. Louis, considered and held void. *McCormick* v. *The City of East St. Louis*, 380.

18. It is a well established rule of law, that where a power is given to municipal authorities in express language to become indebted, the terms and purpose of the grant will measure the extent of the power. *Id.*

19. The provision of the charter held a restriction upon the power of the council, and that any contract made or attempting to be made, looking to the payment of the metropolitan police scrip as unauthorized and prohibited by the charter. *Id.*

20. The health officers of a town have no authority to make a town liable for medicines and medical services furnished to inhabitants who are not paupers. *McIntire* v. *Pembroke*, 527.

21. A law that applies to and confers the same general powers on all incorporated towns and cities in the State, is not necessarily a special law, is not inhibited by any provision of the constitution against special legislation. *McCutchen* v. *The People*, 90.

TRESPASS.

This was an action of trespass to recover for the value of coal taken from the plaintiff's land, and the only question made, is as to the measure of damages. *Held*, that in trespass the measure of damages is the value of the coal after it is dug on the land, or the value of the coal at the mouth of the pit, less the cost of conveying it after dug from the mines to the mouth of the pit. *Robertson* v. *Jones et al.*, 327.

TROVER.

When a mortgage provides that the mortgagor, until default, &c., has such an interest in the property as is subject to levy and sale unless the mortgagee shall try the right of property, or replevy the same, and unless he does proceed in this manner. the officer is justified in selling whatever interest the defendant in execution has in the property, hence the action of trover will not lie against the officer. *Pike* v. *Colvin*, 129.

TRUSTEE. See BILL TO REDEEM.

TRUST ESTATES.

1. On the 20th day of April, 1850, George Morton, conveyed to Francis and Samuel Voris, as trustees for his daughter, Christiana Morton, in consideration of natural love and affection for his daughter Christiana and one dollar, the whole of Block 103, in Morton, Voris and Laveille's addition to the city of Peoria, to have and to hold the said premises, with the appurtenances, unto the said parties of the second part, or the survivor of them, in trust for the benefit, use and behoof solely, of the said Catharina Morton, and the heirs of her body forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Catharina Morton, during her natural life, with a remainder to the heirs of her body; and in case she should die without issue, then, in that case the legal title to revert to the said party of the first part or his heirs. *Voris* v. *Sloan*, 224.

2. The trustees had advanced $979.74 for taxes advanced, and the property was unproductive. *Id.*

3. The first question, and that which lies at the threshold is, whether the court has power to break in upon the terms of the trust, and to prevent or change the terms of the trust, and to prevent or change the terms and con-

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TRUST ESTATES.
ditions imposed by the creator of the trust. *Held*, that the power may be exercised by the courts. *Id.*

4. The language employed in declaring the trust: "and in case she should die without issue, then, in that case the legal title to revert to the party of the first part or his heirs." Construed and held. under this declaration of trust, that Mrs. Sloan took a vested unconditional life estate, and that the remainder, vested in the heirs of her body at their birth, each taking a share, subject to be diminished as others should be born. *Id.*

5. That as each child at birth took an equitable fee in the premises, and that on the death of one of the heirs the survivors would inherit their share in the proportion, and in the manner prescribed by our statute of descents. *Id.*

6. Had the deed contained no limitation over to the grantor or his heirs, then, at common law the children of her body would have taken an estate tail. *Id.*

7. Entails are abolished by our statute, affirming *Raycraft* v. *Strawn*, and *Butler* v. *Heustis*.

VERDICT.

A verdict of a jury before a justice of the peace in this form, "We the jury find for the plaintiff, fifteen dollars and costs," held to constitute a valid judgment without any further order of the magistrate. *Merritt* v. *Tarman*, 264.

WILLS.

1. By the terms of the will, the appropriations to the institute are to be made, only on the condition that $75,000 shall be contributed by the citizens of Appleton, and the same to be actually paid to the said institute, or secured to the satisfaction of its board of directors, and of the executor, within three years from the time of the testator's death, or from the time the executor may have $50,000 in readiness for the first endowment mentioned in the will. *Held*, that the proposed endowment is made to depend upon a condition that may never happen, and that until the contingency does occur, that there is no beneficiary legally capable of receiving the $75,000 nor any part thereof, and that without such a beneficiary the trust is not *present* and *active*, two elements indispensably requisite to the validity of the trust. *Schintz, Ex'r* v. *Ballard*, 274.

2. That this will, if it could be construed as a conveyance of the real estate to the executor in trust, or as giving him a power of sale for the purpose of the intended trust, might, in view of the fact that it allows three years or more, within which the conditions may be fulfilled, create a perpetuity. *Id.*

3. That by the terms of the statute of Wisconsin, the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate. *Id.*

4. That so much of the will as was intended for the benefit of the Appleton Collegiate Institute, or any other similar institute, &c., held null and void. And that the property intended to be conveyed to the institute must go as the law directs in relation to the descent of the property of intestates. *Id.*

5. That the personal property that shall remain after the payment of all debts and funeral expenses and expenses of administration, must be distributed as follows: One half to the defendant Harriet S. Edwards, under the residuary claim of the will, and the other half, which is not legally disposed of by the will, to the heirs at law, one of whom is the said Harriet S. Edwards, under the statute of Wisconsin. *Id.*

END OF VOL. I.

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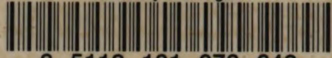
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